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The Constitutional Court Reviews the Early Dissolution of the West German Parliament

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Constitutional scholars in the Federal Republic of Germany will long remember the early dissolution of the West German parliament (*Bundestag*) in December 1982, which took place in order to make way for new elections in March 1983. Although dissolution of the parliamentary body for the purpose of holding elections prior to the expiration of the regular legislative session is done as a matter of course in some nations,¹ the dissolution of the *Bundestag* in December 1982 was only the second time such an event had occurred during the thirty-four year history of the Federal Republic.² In light of the 1949 Bonn Constitution (*Grundgesetz*)³ and its severely restrictive provisions regarding early dissolution, the legality of the December dissolution was the subject of lively debate. Indeed, many legal scholars thought that dissolution was a manipulation of the Bonn Constitution. The issue was ultimately submitted to the Federal Constitutional Court (*Bundesverfassungsgericht*), which upheld the constitutionality of the proceedings.⁴

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1. In Austria, for example. See *infra* text accompanying note 158.

2. The other early dissolution occurred in 1972. See *infra* text accompanying note 52.

3. The *Grundgesetz*, or "Basic Law," is the present constitution of the Federal Republic of Germany.

4. Judgment of Feb. 11, 1983, *Bundesverfassungsgericht* [BVERFG], 1983 *EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT* [EuGRZ] 57. Shortened versions are found in 1983 *NEUE JURISTISCHE WOCHENSCHRIFT* [NJW] 735; 1983 *DIE ÖFFENTLICHE VERWALTUNG* [DöV] 236; 1983 *JURISTENZEITUNG* [JZ] 244. All references to the court's decision in this article will be taken from the *EuGRZ*.

This Article investigates the legal issues raised by the early dissolution, and the Constitutional Court's February 1983 decision as to its constitutionality. The study also examines possible constitutional amendment in the wake of the court's decision.

In the first section of the Article, background information necessary to an understanding of the court's decision is presented. The unique West German "constructive vote of no-confidence" which led to the change in government in September 1982 is explained in the context of its historical background. Related provisions on dissolution are also discussed; of particular interest is the "vote of confidence" provision used in 1982 to bring about the desired end to the legislative session.

The second section discusses the Federal Constitutional Court's decision reviewing the early dissolution. As the Constitutional Court has no real counterpart in the United States judicial system, discussion of the decision is prefaced by a short comparative digression explaining the court's exercise of subject-matter jurisdiction in the case. The court's majority and separate opinions are then described in detail.

The concluding section examines prospects for constitutional change. Several proposals have been made which would amend the Bonn Constitution to permit easier dissolution. The most important proposals are presented, with comparative glances at West Germany's neighbors.

This Article is intended to present an important milestone in the postwar West German experience with democracy to English speaking readers. Consideration of the court's judgment and of the events leading up to it provides a stimulating study not only for lawyers and legal scholars, but also for political scientists, historians, and students of comparative law. For political scientists, investigation of the dissolution illuminates the contemporary West German political scene and the political practices that are developing under the Bonn Constitution. Historians will find that the controversy provides insight into West Germany's efforts to build a democratic society after its nightmarish experience with National Socialism. For students of comparative law, the judgment of the Constitutional Court illustrates the court's methods of constitutional interpretation and its unique powers of judicial review with respect to the political branches of government.

I. POLITICAL BACKGROUND AND LEGAL ISSUES

A. The End of an Era

On October 1, 1982, the social/liberal coalition that had been governing the Federal Republic since 1969 lost its majority in the *Bundestag* and was replaced by a new political partnership. The change ended thirteen years of cooperation between the social-democratic *Sozialdemokratische Partei Deutschlands (SPD)* and the small liberal *Freie Demokratische Partei (FDP)*. The *SPD/FDP* coalition, first led by Chancellor Willy Brandt (*SPD*) and since 1974 by Helmut Schmidt (*SPD*), espoused policies which, like those of other western governments during the late sixties and seventies, were characterized by expanding state spending for social programs and détente with the Eastern Bloc nations.⁵ The source of the coalition's most recent mandate was the regular 1980 election, during which both parties had campaigned on promises of continuing the partnership.⁶

Less than halfway through its third four-year term of office, the *SPD/FDP* coalition began to flounder. As in other Western European nations and in the United States, the West German economy was suffering from inflation, unemployment, and sluggish economic growth.⁷ The coalition partners found it increasingly difficult to agree upon the appropriate remedial measures, and on February 3, 1982, Chancellor Schmidt moved for a vote of confidence in the *Bundestag* in order to secure his wavering majority. The February vote was in Schmidt's favor, but tensions continued to mount throughout the spring and summer of 1982. On September 17, the four *FDP* ministers in Schmidt's

5. The 13 years of the social/liberal coalition are considered in detail in an eight-part series in the weekly newspaper *Die Zeit*, beginning September 24, 1982 and ending November 12, 1982. See Dahrendorf, *Das Bündnis der Selbstbewussten*, *Die Zeit*, Sept. 24, 1982, at 4; Altmann, *Vom Aufbruch zum Bruch*, *Die Zeit*, Oct. 1, 1982, at 9; Baring, *Die Wende kam schon vor acht Jahren*, *Die Zeit*, Oct. 8, 1982, at 4; Becker, *Helmut Schmidts aussenpolitisches Vermächtnis*, *Die Zeit*, Oct. 15, 1982, at 3; Schwarz, *In den Grenzonen des gelobten Landes*, *Die Zeit*, Oct. 22, 1982, at 9; Bucerius, *Sie meinten es ja so gut*, *Die Zeit*, Oct. 29, 1982, at 9; Löwenthal, *Draussen geachtet, im Innern stabil*, *Die Zeit*, Nov. 5, 1982, at 9; Dönhoff, *Vorher und nachher*, *Die Zeit*, Nov. 12, 1982, at 9.

6. The Constitutional Court took note of this fact in its opinion, 1983 EuGRZ at 58. The *SPD* won 42.9% of the vote, and the *FDP* 10.6%. *Id.* Under article 39(1) of the *Grundgesetz*, the *Bundestag* is elected for a four-year period.

7. Real economic growth for 1982 was 1% less than in 1981. Inflation was approximately 5%. Unemployment was approximately 7.5%, affecting some 2.2 million workers. See Jungblut, *Abschied von einem Götzen*, *Die Zeit*, Oct. 29, 1982, at 17; Jungblut, *Ein Zündfunke für die Hoffnung*, *Die Zeit*, Dec. 31, 1982, at 15, 22; Dönhoff, *Am Ende doch nicht gescheitert*, *Die Zeit*, Sept. 24, 1982, at 1.

cabinet resigned.⁸

Having lost the support of his coalition partners, Chancellor Schmidt considered moving once again for a vote of confidence. Given the fact that he had lost the support of the *FDP* and thus his majority in the *Bundestag*, the vote was unlikely to be decided in Schmidt's favor. Two alternatives for the reformation of the government came into question at this point. Under article 68 of the Bonn Constitution, Schmidt could petition the federal president to dissolve the *Bundestag*. If, as expected, the president agreed to dissolve the *Bundestag*, elections would follow immediately and another government would emerge from the new political constellation in the parliament.⁹ This solution presumed that the conservative opposition parties, the *Christlich Demokratische Union/Christlich Soziale Union (CDU/CSU)*,¹⁰ would not join with the *FDP* in pursuing the second alternative available under article 67 of the Bonn Constitution for forming a new government. Under article 67 of the Bonn Constitution, a "constructive vote of no-confidence" permits the opposition parties to register a vote of no-confidence against a sitting chancellor on the condition that they elect a new chancellor at the same time.¹¹

Chancellor Schmidt's proposal for immediate dissolution was eventually rejected. Leaders of the *CDU/CSU* and *FDP* were able to agree on an alternative candidate for the chancellorship and, on October 1, 1982, Helmut Kohl of the *CDU* was elected in the *Bundestag* as the new chancellor under article 67 by a vote of 256 to 235, with four deputies abstaining.¹² Kohl's victory marked the first time that the constructive vote of no-confidence had been used successfully to defeat

8. The opinion of the Constitutional Court, 1983 EuGRZ at 58-62, includes a detailed account of the change of government and the events leading to dissolution from which this description is taken. The vote of confidence provisions of the Bonn Constitution are discussed at notes 44-46, *infra*.

9. There was some question as to whether Schmidt's proposal was in accordance with the constitution, as it interfered with the free use of the constructive vote of no-confidence in article 67. Schmidt's proposal was rejected and therefore it is outside the scope of this Article. See Eschenburg, *Die Verfassung manipulieren?*, *Die Zeit*, Sept. 24, 1982, at 8; Schenke, *Die verfassungswidrige Bundestagsauflösung*, 1982 NJW 2521, 2527.

10. The *CSU* is the Bavarian arm of the *CDU*.

11. Article 67(1) reads as follows: "The *Bundestag* can express its lack of confidence in the Federal Chancellor only by electing a successor with the majority of its members and by requesting the Federal President to dismiss the Federal Chancellor. The Federal President must comply with the request and appoint the person elected." (This translation and all subsequent ones from the Bonn Constitution are taken from PRESS & INFORMATION OFFICE OF THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY, THE BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY (1974).)

12. 1983 EuGRZ at 58.

a sitting chancellor, and the upset was widely referred to in the press as the end of an era.¹³

The new coalition promised changes in governmental policy¹⁴ and pledged that elections would be held in March 1983. The March 1983 election was negotiated as part of the agreement between the *CDU/CSU* and *FDP* prior to the election of Helmut Kohl as chancellor.¹⁵ It is not entirely clear what motivated the parties to promise new elections, although, as shall be seen later in this Article, their rationale was ultimately to be of key importance in resolving the constitutional issues which arose in connection with the early dissolution. Some commentators surmised that the new coalition postponed the election until March so that the voters would forget their sympathies for the defeated Helmut Schmidt.¹⁶ It was, however, by no means certain that the March election would be of particular advantage to its proponents. Results of elections to the state parliaments (*Landtage*) in Hamburg and Hessen in the fall of 1982, for example, had not given any political party a decisive majority.¹⁷

A further source of political uncertainty in early 1983 was the beginning of a shift in the three party political structure (with two large parties—*CDU/CSU* and *SPD*—and the small *FDP*) which had existed since 1961. In the fall 1982 elections to the *Landtage* of Hessen, Bayern, and Hamburg, the *FDP* had lost its seats due to its inability to capture five percent of the vote.¹⁸ A new party, the "Greens,"¹⁹ was

13. See, e.g., *supra* note 5.

14. Members of the new government announced plans to curb government spending for social programs, and advocated a less conciliatory stance with respect to the Warsaw Pact nations. Both coalition partners quickly agreed upon a series of emergency measures designed to combat unemployment and check government spending, and to revise the 1983 budget which had been proposed by the *SPD*. See *Das Program für den Wechsel*, *Die Zeit*, Oct. 1, 1982, at 8.

15. 1983 EuGRZ at 58.

16. Fromme, *Wenn einer sich das Vertrauen verneinen lässt*, *Frankfurter Allgemeine Zeitung* (FAZ), Sept. 29, 1982, at 12, col. 2.

17. See *Bis es passt*, *DER SPIEGEL*, Oct. 4, 1982, at 35; *Geht nicht*, *DER SPIEGEL*, Oct. 11, 1982, at 142; Schwelien, *Sie liebten und sie hassten sich*, *Die Zeit*, Dec. 3, 1982, at 33; Buhl, *Einer muss was zu sagen haben*, *Die Zeit*, Dec. 10, 1982, at 3.

18. 1983 EuGRZ at 71-72. Parties receiving less than five percent of the vote are not permitted to send deputies to the *Bundestag* according to the *Bundeswahlgesetz* (Federal Election Law) of May 7, 1956. 1956 *Bundesgesetzblatt* [BGBl.] I 383, § 6(4). This "five percent clause" was drafted in order to curb the development of splinter parties, the proliferation of which had been partly responsible for the inability of the Weimar Republic governments to function. See *infra* text accompanying notes 35-53.

19. The "Green" party is a loosely knit, grassroots coalition of Germans whose general aims are environmental protection, nuclear disarmament, and disengagement from the NATO alliance.

moving in as a potential new force on the political scene. The "Greens" were able to overcome the five percent barrier in five *Landtage*, including Hamburg and Hessen.²⁰ Many observers of these trends voiced concern that the new federal election would introduce chaos into the *Bundestag*. In Hamburg and Hessen, the uncompromising position of the "Greens" against the stationing of United States Pershing II and Cruise missiles in West Germany and the party's extreme emphasis on environmental protection issues had made the coalition process so difficult that a majority government could not be formed in either of these *Landtage*, and repeated elections were needed.²¹ There was some apprehension that the same thing would happen in the *Bundestag*, with the effect that the Federal Republic would become "ungovernable."²²

If the uncertainty of the political landscape motivated the new coalition to postpone elections until March, no politician admitted it openly. Leaders of the new coalition explained instead that the economic emergency necessitated immediate reform of the 1983 budget, and that the formation of the coalition was merely a temporary solution. The chairman of the *CDU/CSU* caucus in the *Bundestag*, Dr. Albert Dregger, explained during debate over the budget on December 14, 1982 that his party viewed the tasks of the coalition as limited to passing emergency economic measures.²³ He stated that the *CDU/CSU* was not willing to work further with the *FDP* without new elections. Said Dregger, "In order to overcome the economic and financial crisis which we face, and in order to reach the weighty decisions on foreign policy which lie before us, the new government needs an entire legislative period. It is for this reason that we desire new elections."²⁴

A second motivation for the new election was doubtless a widespread feeling that the new government lacked "legitimacy."²⁵ Despite the fact that the liberal-democratic coalition had come into power completely in conformance with the Bonn Constitution, in some quarters there was a sense that the *FDP* had betrayed the voters who had sup-

20. Hauch, *50 Kilometer vor Bonn*, DER SPIEGEL, Oct. 4, 1982, at 134, 136.

21. See, e.g., Oertzen, *Warum keinen rot-grüne Koalition?* DER SPIEGEL, Sept. 27, 1982, at 35; *Wieder vor der Tür*, DER SPIEGEL, Oct. 18, 1982, at 131.

22. See, e.g., Fack, *Öffnung zur Wahl*, FAZ, Dec. 15, 1982, at 1; Reißmüller, *Am besten unbeirrt weiter*, FAZ, Oct. 29, 1982, at 1.

23. 1983 EuGRZ at 59.

24. *Id.* (This and all subsequent translations of the court's decision are the author's.)

25. See, e.g., Augstein, *Neuwahlen aus schlechtem Gewissen?*, DER SPIEGEL, Oct. 11, 1982, at 18; Steiger, *Legitimität gegen Legalität?*, Die Zeit, Dec. 3, 1982, at 5.

ported it in 1980 assuming that it would enter into a coalition with the *SPD*.²⁶ Some members of the *SPD* described the new government as "legal" but without "legitimacy."²⁷ Even Chancellor Kohl seemed to be thinking along these lines in his remarks before the *Bundestag* on December 17, 1982, when he stated that Germany's chances of recovering from its most serious economic and financial crisis "turn upon whether the work of the parties controlling the government *is supported by a decisive mandate from the voters*. The necessary political action must be planned for the longterm. We do not want to bring about piecemeal accomplishments; rather, we want to lay a permanent foundation."²⁸

Despite complaints about the motivations of the new government, the proposal of March elections was acceptable to all parties in the *Bundestag*, even to the *SPD*, whose main complaint was that elections had not occurred earlier.²⁹ A popular poll indicated that seventy-nine percent of the voters also wanted an election.³⁰ Only one obstacle stood in the way of the general consensus—in order to clear the way for the March election, the *Bundestag* would have to be dissolved.³¹ There was however, no provision in the Bonn Constitution clearly allowing for dissolution when the federal chancellor was supported by a secure majority in the *Bundestag*. The provision for a constructive vote of no-confidence in article 67 only provides for the installation of the new chancellor by a vote in the *Bundestag*, not for dissolution and subsequent referral of the change in government to the voters.³² Furthermore, it was not certain whether articles 63 and 68, the only two articles providing for dissolution by the federal president, could be employed by a majority chancellor to bring about new elections. Heated debate arose as to whether and how the *Bundestag* could be legally dissolved.³³ In order to understand this debate and its ultimate resolution, it is necessary to briefly examine German constitutional history.

B. Bonn is not Weimar

The early dissolution issue, arising nearly fifty years after Hitler's

26. *Id.*

27. See Zundel, *Signale aus dem Fegefeuer*, *Die Zeit*, Oct. 8, 1982, at 2 for a report of the debate prior to the constructive vote of no-confidence, during which this issue arose.

28. 1983 EUGRZ at 60 (emphasis added).

29. See *supra* text accompanying note 9.

30. *Stirbt die FDP, überlebt Kohl?*, *DER SPIEGEL*, Oct. 11, 1982, at 33, 38.

31. *Grundgesetz* [GG] art. 39 (1) (W. Ger.).

32. See *supra* note 11.

33. See *infra* notes 71-91 and accompanying text.

fateful assumption of leadership of the Weimar Republic on January 30, 1933, struck a nerve among politicians and legal scholars.³⁴ The drafters of the 1949 Bonn Constitution had been mindful of the fact that one of the reasons for Hitler's ability to gain control of Germany in 1933 had been the inability of the numerous political parties at the time to form a stable government under the 1919 Weimar Constitution.³⁵ During the years between 1920 and 1932, the Weimar Republic was led by twenty different governments, twelve of which were supported by only a minority in the parliament (*Reichstag*).³⁶ All seven *Reichstage* elected during this time were dissolved before the expiration of the regular legislative session.³⁷ Naturally, such governments were incapable of solving the pressing problems of inflation and unemployment suffered during these years. This circumstance made the public receptive to the apparent solutions offered by the National Socialists.³⁸ The drafters of the 1949 Bonn Constitution believed that the instability of the Weimar Republic had been inherent in its constitutional structure;³⁹ the Bonn Constitution must be understood in part as an effort to remedy the flaws perceived in the Weimar Constitution.⁴⁰

The Weimar Constitution of 1919 was Germany's first real experience with a parliamentary system of government. Under the Constitution of 1871 (*Reichsverfassung*), the parliamentary organs had been ineffectual as a democratic expression of the will of the populace. This was because the *Kaiser* exercised autocratic control over the German Federation. As president of the Federation, the *Kaiser* could call and dismiss both legislative houses at will.⁴¹ The chancellor was named by the *Kaiser*, and, until a change in the constitution on October 28, 1918, the chancellor was not dependent upon the support of the parliament to hold office.⁴²

The Weimar Constitution attempted to blend the so-called "presi-

34. See Schneider, *Neuwahlen—Ausweg oder Irrweg?*, DER SPIEGEL, Sept. 27, 1983, at 27.

35. Maurer, *Vorzeitige Auflösung des Bundestags*, 1982 DÖV 1001, 1002.

36. *Id.*

37. *Id.*

38. For a detailed historical study of the dissolution of the Weimar Republic, see K.D. BRACHER, *DIE AUFLÖSUNG DER WEIMARER REPUBLIK* (6th ed. 1978).

39. See von Mangoldt, *Die Auflösung des Bundestags*, 1950 DÖV 697, 698-99. Von Mangoldt was a member of the Parliamentary Council that drafted the *Grundgesetz*.

40. *Id.*

41. REICHsverfassung of 1871, 1871 Reichsgesetzblatt [RGB1] 64, arts. 11-13. The parliament was dissolved by the Council of the Federation (*Bundesrat*) at the agreement of the *Kaiser* under article 24.

42. *Id.*; art. 15, amended by the Law of Oct. 28, 1918, 1918 RGB1 1274.

dential" elements of the 1871 Constitution (*Reichsverfassung*) with characteristics of parliamentary cabinet government.⁴³ The new president of the *Reich*, like the *Kaiser*, was to have a strong role in the government. The president retained the *Kaiser's* power to appoint and dismiss the chancellor and government ministers.⁴⁴ Unlike the *Kaiser*, however, the president was directly elected by the people.⁴⁵ Under the Weimar Constitution, the president's power was balanced against that of the parliament (*Reichstag*), another organ directly elected by the people. The parliament had the power to dismiss the chancellor or ministers through a vote of no-confidence.⁴⁶ If the parliament and president disagreed on an issue (or if a chancellor appointed by the president disagreed with the parliament), the president had the power to dissolve the parliament and appeal to the people as the ultimate arbitrators of the dispute. A provision in the Weimar Constitution prohibiting dissolution more than once each year over the same disputed issue ensured that the wishes of the people would be carried out.⁴⁷ The parliament had its own weapon against the president in the case of disagreement. Under article 43 of the Weimar Constitution, the parliament could appeal to the voters to recall the president. If the voters failed to do so, the president was treated as having been newly elected and the parliament was dissolved. The Weimar Constitution also had provisions for submitting legislation to referendum on the motion of the president or the parliament.⁴⁸

After World War II, the drafters of the Bonn Constitution attempted to build more stability into the Federal Republic's new system of government. One way was to remove the elements of direct democracy that were the perceived causes of fragmentation and instability during the Weimar Republic.⁴⁹ Under the new Bonn Constitution, the Federal Republic would become a "representative democracy."⁵⁰ This scheme established the federal parliament (*Bundestag*) as the only governmental organ directly elected by the citizens. The *Bundestag* was

43. Maurer, *supra* note 35, at 1002.

44. REICHsverfassung of 1919, 1919 RGBI 1383, art. 53.

45. *Id.* art. 41.

46. *Id.* art. 54.

47. *Id.* art. 25.

48. *Id.* art. 73.

49. See *Schlussbericht der Enquête-Kommission Verfassungsreform*, Deutscher Bundestag, 7. Wahlperiode, DRUCKSACHE 7/5924, Dec. 9, 1976, at 9-14, 22-23 [hereinafter cited as *Enquête Report*]; For information on the *Enquête* Commission, see *infra* text accompanying note 70.

50. *Id.*; Maurer, *supra* note 26, at 1002-03.

given the responsibility for electing the federal chancellor and for electing and dismissing the federal president.⁵¹ The situations in which issues could be submitted directly to the public in a referendum were drastically limited.⁵² It was hoped that by decreasing the direct impact of fragmented special interest groups on the political process, the pitfalls of the Weimar Republic could be avoided. By entrusting the government to representatives responsible to the nation as a whole rather than to individual groups of voters, the drafters of the Bonn Constitution meant to avoid the situation where disagreement among small political parties prevented the formation of workable governing coalitions.⁵³

The core of West Germany's new "representative democracy" is found in article 38 of the Bonn Constitution, which provides that "[T]he deputies to the German *Bundestag* shall be elected by general, direct, free, equal and secret elections. They shall be representatives of the whole people, not bound by orders and instructions, and shall be subject only to their conscience."⁵⁴ The purpose of this provision was to free the deputies to the *Bundestag* from obligation to any particular interest group that could prevent the formation and functioning of an integrated governmental program. Rather than being legally bound to constituents by an "imperative mandate," a West German deputy's representative function is to use his or her mandate to represent the nation as a whole.⁵⁵

A second strategy for stability in Bonn involved changing the balance of power between the president, chancellor and *Bundestag*. The role of the president was weakened by making the office a neutral and

51. [GG] arts. 54, 63, 64 (W. Ger.).

52. *Id.* art. 29. This article provides for popular initiatives with regard to the reorganization of federal territory after World War II.

53. *Enquête Report*, *supra* note 49, at 9-14, 22-23.

54. *See id.* at 24.

55. *See* INTER-PARLIAMENTARY UNION, PARLIAMENTS: A COMPARATIVE STUDY ON THE STRUCTURE AND FUNCTIONING OF REPRESENTATIVE INSTITUTIONS IN FIFTY FIVE COUNTRIES 52 (2d ed. 1966) [hereinafter cited as PARLIAMENTS]. The freedom of the deputy to the *Bundestag* is in practice somewhat restricted due to the discipline imposed by the party caucuses (*Fractionen*) in the *Bundestag*. Although the deputy is legally free to vote as his or her conscience dictates, he or she is not free from party sanctions (such as expulsion) should he or she fail to support the party's program. One commentator has reasoned that party discipline does not neutralize the freedom guaranteed in article 38 because the deputy can work within the *Fraktion* to influence its vote as a body; the unified vote that emerges from the *Fractionen* is in reality a consensus of its members, reached internally. Friesenhahn, *Parteien und Parlamentarismus nach dem Grundgesetz für die Bundesrepublik Deutschland*, in DEUTSCH-SPANISCHES VERFASSUNGSRECHTS-KOLLOQUIUM 23, 36 (A. Randelzhofer ed. 1982).

nonpolitical subordinate to the *Bundestag* and chancellor. Unlike the president's counterpart in the Weimar Republic, the federal president is elected by the *Bundestag* rather than by the public. The president is obligated to appoint the chancellor elected by the *Bundestag* and to dismiss a chancellor dismissed by the *Bundestag*. As a neutral officer, the president may not hold any other government position and plays only a limited role in governmental decisions.⁵⁶

At the same time, the Bonn Constitution strengthened the position of the federal chancellor by making it more difficult for the *Bundestag* to unseat the chancellor. Article 67 of the Bonn Constitution permits a vote of no-confidence against the government only when the parties in opposition are able to elect a new chancellor at the same time. This article was specifically designed to prevent the situation which had repeatedly occurred in the Weimar Republic, in which the parties in opposition had been able to topple the government even though they could not form a majority to proceed with further state business.⁵⁷

Finally, the Bonn Constitution imposed stringent restrictions on early dissolution of the *Bundestag*. The federal president's power to dissolve the *Bundestag* is subject to the limitations imposed by two articles:

Article 63 (Election of the Federal Chancellor—Dissolution of the *Bundestag*)

- (1) The federal chancellor shall be elected, without debate, by the *Bundestag* upon the proposal of the federal president.
- (2) The person obtaining the votes of the majority of the members of the *Bundestag* shall be elected. The person elected must be appointed by the federal president.
- (3) If the person proposed is not elected, the *Bundestag* may elect within fourteen days of the ballot a federal chancellor by more than one-half of its members.
- (4) If no candidate has been elected within this period, a new ballot shall take place without delay, in which the person obtaining the largest number of votes shall be elected. If the person elected has obtained the votes of the majority of the members of the *Bundestag*, the federal president must appoint him within seven days of the election. If the person elected did not obtain such a majority, the federal president must within seven days either appoint him or dissolve the *Bundestag*.

56. GG arts. 54, 63(2), 67, 55. See Schenke, *supra* note 9, at 2524; von Mangoldt, *supra* note 39, at 699.

57. Article 67 is quoted in note 11, *supra*. For a discussion of the legislative history of this article with extensive citations, see 1983 EuGRZ at 80-85 (Rinck, J., separate opinion).

Article 68 (Vote of Confidence—Dissolution of the *Bundestag*)

- (1) If a motion of the federal chancellor for a vote of confidence is not assented to by the majority of the members of the *Bundestag*, the federal president may, upon the proposal of the federal chancellor, dissolve the *Bundestag* within twenty-one days. The right to dissolve shall lapse as soon as the *Bundestag* with the majority of its members elects another federal chancellor.
- (2) Forty-eight hours must elapse between the motion and the vote thereon.

By encouraging or forcing repeated efforts to build a majority in the *Bundestag*, articles 63 and 68 seek to make it as difficult as possible for the political parties to avoid their duty to work together to find political solutions to the nation's problems. The provisions for dissolution in these articles operate as a threat to uncooperative political parties, coercing them to form an effective parliamentary majority or face the possible loss of seats following an election campaign.⁵⁸

It is important to note that under both articles 63 and 68, dissolution is not the required resolution of the situation where the chancellor has lost the support of the majority of deputies in the *Bundestag*. In article 63, the president's discretion to dissolve the *Bundestag* comes into play only after repeated attempts to elect a chancellor have failed. Even in a case where the president may exercise discretion to dissolve the *Bundestag*, the president has the option to name a minority chancellor if it appears that this would be the wiser political choice. Article 68 requires the cooperation of the *Bundestag*, chancellor and president before the dissolution of the *Bundestag* is allowed and provides escape routes from the dissolution procedure at various stages.⁵⁹ A further indication that dissolution is not mandatory is found in article 81, which provides for emergency legislative measures to assist a minority government in carrying out state business in case the president decides not to dissolve the *Bundestag* under article 68.⁶⁰

58. PARLIAMENTS, *supra* note 55, at 287-88.

59. See the Constitutional Court's analysis at notes 136-40 *infra*.

60. GG art. 81(1)-(2) reads as follows:

- (1) Should, in the circumstances of Article 68, the *Bundestag* not be dissolved, the Federal President may, at the request of the Federal Government and with the consent of the *Bundesrat*, declare a state of legislative emergency with respect to a bill, if the *Bundestag* rejects the bill although the Federal Government has declared it to be urgent. The same shall apply if a bill has been rejected although the Federal Chancellor had combined with it the motion under Article 68.

- (2) If, after a state of legislative emergency has been declared, the *Bundestag* again rejects the bill or adopts it in a version stated to be unacceptable to the Federal Government, the bill shall be deemed to have become a law to the extent that

Articles 63 and 68 make early dissolution of the legislative body more difficult in West Germany than in most of its Western European neighbors. The constitutions of France (Fifth Republic, article 12), Belgium (article 71), the Netherlands (article 82), Austria (article 29), Italy (article 88), Ireland (article 13), Denmark (article 32), Portugal (article 81), Sweden (article 108), and Finland (article 27) all permit the head of state to dissolve the parliament before the end of the legislative session without meeting any particular legal or political prerequisites.⁶¹ This unrestricted practice is also followed in Great Britain.⁶² In these countries, early dissolution may serve as a means of referring controversial issues to the voters, of legitimizing a legislative body that no longer appears to represent the will of the people, or of resolving a dispute between the parliament and government. Early dissolution may also be used by the government to bring about elections at a time advantageous to it or to maintain discipline among the majority party members.⁶³ Bringing an early end to the legislative session is not necessarily an extraordinary emergency measure in these nations; rather, it is a tool to be used at the discretion of the head of state to meet certain political needs of the state.

In West Germany, however, the restrictions on early dissolution evidence the intent of the Bonn Constitution's drafters that once the government has been entrusted to members of the *Bundestag* for the four-year period prescribed in article 39, further appeal to the voters should be permitted only in extreme situations. This restriction can be seen as a direct reaction to the German experience during the Weimar Republic.⁶⁴

Prior to December 1982, the issue of early dissolution had arisen in practice in three instances, all concerning the use of article 68. In 1950, there was an unsuccessful effort by the opposition *SPD* to force Chancellor Konrad Adenauer (*CDU*) to use article 68 to dissolve the *Bundestag* so that the issues of rearmament and integration with the West could be submitted to the voters.⁶⁵ In 1966 the *SPD* again at-

the *Bundesrat* consents to it. The same shall apply if the bill is not passed by the *Bundestag* within four weeks of its reintroduction. . . .

61. Wolf & von Welck, *Die Auflösung der Volksvertretung in parlamentarischen Demokratien* in *PARLAMENTSAUFLÖSUNG: PRAXIS—THEORIE—AUSBlick* 131-40 (K. Kremer ed. 1974).

62. *Id.* at 132.

63. *Id.* at 131-40; K. von Beyme, *Die Parlamentarischen Regierungssysteme in Europa* 853 (1970); *Parliaments*, *supra* note 55, at 285-88.

64. See *supra* text accompanying notes 43-57.

65. See von Mangoldt, *supra* note 39.

tempted unsuccessfully to persuade Chancellor Erhard (*CDU*) to dissolve the *Bundestag* by means of the vote of confidence after the *FDP* left his governing coalition but refused to join with the *SPD* to elect a new chancellor under the constructive vote of no-confidence.⁶⁶ It was not until 1972 that the first premature dissolution of the *Bundestag* took place. In that year, the opposition *CDU* had enough votes to block the passage of the government's proposed budget by a vote of 247 to 247.⁶⁷ This number of votes did not, however, give the opposition the requisite majority to replace Chancellor Willy Brandt (*SPD*) by a constructive vote of no-confidence under article 67. The situation was a stalemate; the government could not pass its budget, and the opposition could not unseat the government. Chancellor Brandt resolved the situation by moving for a vote of confidence under article 68, with the intent that it be decided against him. A vote of no-confidence enabled Brandt to request dissolution of the *Bundestag*, opening the way for new elections which ultimately gave the *SPD* a secure majority.⁶⁸ Brandt's use of article 68 to deliberately bring about dissolution rather than to consolidate a majority was generally considered to be within constitutional bounds, but it did not escape criticism.⁶⁹ The 1972 stalemate prompted the formation of a legislative commission (*Enquête-Kommission*) to study possible amendments to the Bonn Constitution. In its final report in 1976, the Commission recommended, among other things, a change in the Bonn Constitution to allow the *Bundestag* to dissolve itself.⁷⁰ This proposal received no debate in the *Bundestag*, which ultimately failed to act upon it. The issue of self-dissolution gained no further public attention until the advent of the present controversy.

C. The Legal Controversy

The 1982 debate on how best to dissolve the *Bundestag* centered on three alternatives. Procedurally, the Bonn Constitution contained two potential means for Chancellor Kohl to bring about dissolution and new elections. He could either resign, thus activating the proce-

66. K. VON BEYME, *supra* note 63, at 659.

67. 1983 EUGRZ at 79 (Rinck, J., separate opinion).

68. For a short summary of the 1972 situation see *id.* For a detailed analysis see Lange and Richter, *Erste Vorzeitige Auflösung des Bundestags*, 1973 ZEITSCHRIFT FÜR PARLAMENTSFRAGEN [ZPARL] 38.

69. See, e.g., Bull, *Parlamentsauflösung—Zurückverweisung an den Souverän*, 5 ZEITSCHRIFT FÜR RECHTSPOLITIK [ZRP] 201-04 (1972); Schneider, *Die vereinbarte Parlamentsauflösung*, 1973 JZ 652.

70. *Enquête Report*, *supra* note 49, at 32-48.

dures in article 63, or he could pose a motion for a vote of confidence under article 68 and ask members of his party to withhold their support. Given the hurdles which the Bonn Constitution places in the way of dissolution, it was highly uncertain whether either of these procedures was permissible where the chancellor had, as did the Kohl government, the support of the majority of deputies. As noted above,⁷¹ the purpose of these articles was to bring about an effective majority in the *Bundestag* rather than to permit new elections. Should dissolution under articles 63 and 68 prove to be illegal, the only alternative available would be a constitutional amendment providing for easier dissolution of the *Bundestag*.

All three possibilities were discussed extensively during the widespread public debate which developed between the October 1 election of Chancellor Kohl and the eventual dissolution of the *Bundestag* on January 7, 1983.⁷² In general, this debate pitted legal scholars against politicians.⁷³ Most academicians felt that a request for dissolution by a chancellor with a majority in the *Bundestag* was an unconstitutional manipulation of articles 63 and 68.⁷⁴ The politicians believed that the election had become a practical necessity. While the change in government may have been constitutionally permissible under article 67, the *FDP* had campaigned in 1980 on the promise of maintaining its governing coalition with the Social Democrats. Some thus felt that the *FDP* had abused its mandate. Also, the new government had committed itself to March elections, and both parties were already incurring expenses in anticipation of the campaign. Some politicians believed that declaring the promised elections a nullity would not make a good public impression⁷⁵ and would be a waste of campaign preparations already undertaken.

The idea of a constitutional amendment allowing for self-dissolution of the *Bundestag* was seen by many critics as the "cleanest" solu-

71. See *supra* text accompanying note 58.

72. A complete survey of the coverage of this issue in the German press would be a study in itself. See notes 5, 14-17, 21-34, *supra* for examples of the press coverage.

73. Fromme, *Politiker und Professoren streiten über die Bundestagsauflösung*, FAZ, Dec. 11, 1982, at 6.

74. 1983 EuGRZ at 85-86 (separate opinion of Justice Rinck). See also Maurer, *supra* note 35; Schenke, *supra* note 9; Schröder, *Parlamentsauflösung bei gesicherten Mehrheitsverhältnissen?*, 1982 JZ 786; Schenke, *Zur verfassungsrechtlichen Problematik der Bundestagsauflösung*, 1983 NJW 150; *Enquête Report*, *supra* note 49, at 39. Those arguing that the early dissolution was within the limits of the *Grundgesetz* included Püttner, *Vorzeitige Neuwahlen—Ein ungelöstes Reformproblem*, 1983 NJW 15; Liesegang, *Zur verfassungsrechtlichen Problematik der Bundestagsauflösung*, 1983 NJW 147.

75. See Schenke, *supra* note 74, 1983 NJW at 150.

tion because it would not require stretching the meaning of articles 63 or 68. The use of these articles to disrupt rather than to consolidate a majority appeared to these critics to be a manipulation of the constitution at the expense of the legislative purpose. The fact that the *Enquête Kommission* had carefully considered and recommended a self-dissolution amendment in 1976 undermined the counter argument that a constitutional change arising from the current situation would be just as manipulative as the use of the existing constitutional provisions.⁷⁶

On the other hand, an amendment to the Bonn Constitution would give rise to other constitutional counter arguments, and such an amendment seemed politically unwise under the circumstances. Amendment of the Constitution in the midst of the controversy would arguably be an infringement of article 79, which states that the constitution may only be changed by a law passed by two-thirds of the members in both legislative chambers (*Bundestag* and *Bundesrat*). Although occasion for amending the constitution may arise out of a particular fact situation, the change itself must be an abstract norm good for all future cases, and not merely tailored for a specific situation.⁷⁷ Despite the possibility of drafting a constitutional amendment to meet these requirements (the *Enquête Kommission* had in fact drafted such an amendment), doubt was expressed that the change could be made for the current legislative period.⁷⁸ In any case, it seemed ill-considered to rush such an amendment through the legislature under the heated political conditions which existed. The new government was already concerned with its legitimacy; it did not seem wise to amend the constitution so soon after taking office. For these reasons, the idea of a constitutional amendment was not the route selected by the new coalition for early dissolution.

Willy Brandt and the *SPD* advocated the resignation of the chancellor and his ministers as the best path to new elections.⁷⁹ The resignation would set the provisions of article 63 into action, which required several unsuccessful ballots in the *Bundestag* before it could be dissolved by the federal president. This procedure was seen by its advocates as more "honest" since the chancellor would not be put into the position of asking his supporters to vote against him. Resignation would be an honest expression of his desire not to head the government any longer.

76. See, e.g., Schenke, *supra* note 9, at 2528.

77. Maurer, *supra* note 35, at 1006-07.

78. *Id.* at 1007.

79. Brandt: Kohl soll von Artikel 63 Gebrauch machen, FAZ, Dec. 9, 1982, at 4.

Opponents to proceeding under article 63, however, were disturbed by the thought that members of the *Bundestag* would be put into the "dishonest" position of repeatedly refusing to elect a new chancellor when they had, by a majority, supported the one who had just resigned.⁸⁰ Article 63 had a further disadvantage in that it took control of the dissolution proceedings away from the chancellor and put it into the hands of the deputies and the president. A chancellor losing the vote of confidence under article 68 has the option of requesting dissolution or continuing to govern as a minority chancellor. Once the chancellor resigns under article 63, however, the election of the new chancellor is in the hands of the *Bundestag*, and the president can choose to appoint a minority government without consulting the former chancellor.⁸¹ The new coalition eventually rejected the resignation of Chancellor Kohl as a means to bring about new elections. In his televised announcement of dissolution on January 7, 1983, President Carstens explained that the need for repeated balloting under article 63 made the procedure too uncertain and complex as a path to elections.⁸²

From the outset of the discussion, article 68 seemed to be the most likely procedure to bring about new elections, and it was eventually the mechanism chosen by Chancellor Kohl. Some proponents of this alternative argued that article 68's meaning had been expanded by political practice over the years to encompass situations not foreseen at the time the Bonn Constitution was drafted. Critics questioned whether it would be possible to test the motives of the deputies and chancellor for conformance with the constitution.⁸³ Other supporters of the use of article 68 saw instability in the government similar to that which had existed in 1972, evidenced by the fact that the coalition had been expressly formed for the limited time necessary to take emergency economic measures. These commentators noted that article 68 had been used in 1972 to dissolve the *Bundestag* under the Brandt government, and that this proceeding had been constitutionally acceptable.⁸⁴

Opponents of dissolution under article 68 distinguished the situation of the Brandt government in 1972 from that of Chancellor Kohl in 1982. They pointed out that, unlike the Brandt government, the Kohl

80. Maurer, *supra* note 35, at 1005; Schenke, *supra* note 9, at 2526.

81. Bull, *supra* note 69, at 201.

82. The text of this speech is printed at Carstens: *Ich habe mir die Sache nicht leicht gemacht*, FAZ, Jan. 8, 1983, at 2; see also 1983 EuGRZ at 61-62.

83. See, e.g., Püttner, *supra* note 74, at 15-16; Liesegang, *supra* note 57, at 148-49.

84. This reasoning was followed by the Constitutional Court, 1983 EuGRZ at 70, 73. See Zeh, *Bundestagsauflösung und Neuwahlen*, 1983 DER STAAT 1, 14-15.

government was able to pass its 1983 budget in the *Bundestag*. On December 16, 1982, the day before the balloting on the vote of confidence, Kohl's 1983 budget was passed by a vote of 266 to 206.⁸⁵ The fact that the coalition partners had only agreed to limited cooperation was no evidence of instability to these commentators, who maintained that such agreements were not foreseen in the Bonn Constitution and were therefore of questionable legality.⁸⁶ In addition, those opposing the use of article 68 believed that the legislative history of the provision militated against a motion for a vote of confidence by a chancellor with a majority in the *Bundestag*. They argued that the drafters intended to make dissolution difficult in order to avoid the parliamentary instability which had plagued the Weimar Republic. Kohl's proposal seemed to fly in the face of the drafters' purpose.⁸⁷ Moreover, the interrelationship of article 68 with other relevant constitutional provisions was advanced as an argument against its invocation. The structure embodied in articles 67, 63, 68, 39, and 81 manifested the intent to insure that a functioning majority carries on the government's business for the full legislative session.⁸⁸

Further structural evidence against article 68 dissolution was seen in the limited role of the federal president. By expanding the range of possible situations in which the president was permitted to exercise discretion to dissolve the *Bundestag*, greater political importance would be given to the office than had originally been intended by the Bonn Constitution.⁸⁹ Finally, those concerned with the structure of the Bonn Constitution noted that allowing more frequent dissolution would add undesirable elements of direct democracy by permitting a chancellor faced with a thorny political problem to refer the matter to the voters. Proponents of this point of view argued that the Federal Republic's democracy rested on the principles of "representative democracy," under which direct public participation was limited in order to insure the smooth functioning of the government.⁹⁰ In sum, opponents of dissolution under article 68 felt that the purpose of this provision, as evidenced by its historical background and the overall structure of the Bonn Constitution, was to permit dissolution of the *Bundestag* only as a last resort in two situations: 1) when the chancellor wishes to

85. Maurer, *supra* note 35, at 1005. The figures can be found in 1983 EuGRZ at 59.

86. Schenke, *supra* note 74, 1983 NJW at 152.

87. Schenke, *supra* note 9, at 2523.

88. *Id.* at 2523-24.

89. *Id.* at 2524.

90. Maurer, *supra* note 35, at 1005-06.

strengthen his position by consolidating his majority, as Chancellor Schmidt had intended when he asked for a vote of confidence in February 1982, or 2) when tensions between the *Bundestag* and chancellor have become so extreme that a majority government can no longer function, as was the case when Chancellor Brandt moved for a vote of confidence in 1972.⁹¹

On December 13, 1982, Chancellor Kohl announced that he would pose the motion for a vote of confidence under article 68. On December 17, after a nationally televised heated debate in the *Bundestag*, Kohl lost the vote of confidence by a margin of 213 to 8, with 248 members of the *CDU/CSU* and *FDP* abstaining.⁹² On the same day, Chancellor Kohl asked President Carstens to dissolve the *Bundestag*. President Carstens announced that he would comply with Kohl's wishes on January 7, 1983, and elections were scheduled for March 6, 1983.⁹³

With the President's announcement, the political decision for the new election had been made. On January 17, 1983, four deputies (one from the *CDU*, two from the *FDP*, and one former *SPD* member) petitioned the Federal Constitutional Court to review the legality of the President's actions. The court agreed that it had jurisdiction over the complaint, and on February 16, 1983, declared that the President's actions had been in accordance with the Bonn Constitution.⁹⁴

For observers in the United States, the procedural aspects of the decision are just as interesting as its substance. The Constitutional Court undertook to review what would be deemed a "political question" in United States jurisprudence, and in doing so, displayed a breadth in the scope of its review powers unknown to most of the comparable courts in the world. Therefore, before entering into a detailed substantive explanation of the court's judgment on the merits, a short comparative digression will explain the unusual character of the Constitutional Court's exercise of jurisdiction in this case.

II. THE LEGAL RESOLUTION

A. The Constitutional Court's Power to Review

The Federal Republic's Constitutional Court differs from the

91. Schröder, *supra* note 74, is particularly concerned with the use of article 68 as a crisis managing device.

92. 1983 EuGRZ at 61.

93. See *supra* note 82.

94. 1983 EuGRZ at 66.

United States Supreme Court in two essential aspects, both of which are illustrated by the controversy under discussion. The first difference is that in the Federal Republic, the power to review the constitutionality of the acts of the other two branches of government is centralized in the Federal Constitutional Court, which is an independent organ standing outside of the other courts in the judicial system.⁹⁵ The second difference is that the scope of the Constitutional Court's subject matter jurisdiction is much broader than is that of the United States Supreme Court.⁹⁶ With regard to its institutional characteristics, the Federal Constitutional Court, under its constitution of 1978, is more similar to the constitutional courts of Austria, Italy, and Spain than it is to the United States Supreme Court.⁹⁷ With regard to the scope of its jurisdiction, the far-reaching competence of the West German court distinguishes it from its European counterparts as well as from the United States Supreme Court.

Except under limited circumstances, the United States Supreme Court is a court of appellate jurisdiction.⁹⁸ It shares the power to review the constitutionality of acts of the other branches of government with the other courts in the judicial system, and it sits at the top of the judicial system as a tribunal of last resort.⁹⁹ Constitutional issues reach it as part of a matrix of other issues involved in a particular case; thus the United States Supreme Court may find itself deciding questions of both constitutional and nonconstitutional import within the same proceeding. In contrast, the constitutional courts of West Germany, Italy, Austria, and Spain are not appellate courts in this sense. In these European nations, the power of constitutional review is centralized in a single constitutional court which stands apart from the other courts in the judicial system.¹⁰⁰

In the Federal Republic, the Constitutional Court is a "federal court independent of and separate from all the other constitutional organs."¹⁰¹ These "constitutional organs" include the five specialized hi-

95. Rupp, *The Federal Constitutional Court in Germany—Scope of Its Jurisdiction and Procedure*, 44 NOTRE DAME LAW. 548 (1969).

96. *Id.* at 548-49.

97. *Id.*

98. U.S. CONST. art. III, § 2, cl. 2.

99. M. CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD, 46-47 (1971) refers to the United States system of constitutional review as a "decentralized" or "diffuse" system.

100. *Id.*; R. SCHLESINGER, COMPARATIVE LAW: CASES, TEXT AND MATERIALS 358-59 (4th ed. 1980).

101. Gesetz über das Bundesverfassungsgericht (Law of the Federal Constitutional Court) of March 12, 1951, 1951 BGBI I 243, § 1(1) (Author's translation).

hierarchies of the judicial system, which consist of the courts of ordinary, labor, social security, tax, and administrative jurisdiction. Each of the five hierarchies is three-tiered, with courts of first instance, intermediate appellate courts, and courts of last resort.¹⁰² While these specialized courts are empowered to consider the constitutionality of the statutes which apply in the cases that come before them, they are not competent to declare any statute unconstitutional. If a specialized court believes that a statute relevant to its decision is unconstitutional, it must refer the constitutional issue (but not the whole case) to the Federal Constitutional Court for determination before proceeding any further. The Constitutional Court resolves the constitutional issue only and returns the record to the referring court, which applies the decision to the case.¹⁰³

The issue of constitutionality may be raised by the specialized court itself or by an individual who feels that his or her constitutional rights have been infringed by the government. The former type of procedure is referred to as a *konkrete Normenkontrolle* (judicial referral); the latter avenue is called a *Verfassungsbeschwerde* (constitutional complaint).¹⁰⁴ Procedures similar to the *konkrete Normenkontrolle* exist in Spain, Italy and Austria; the *Verfassungsbeschwerde* is found only in Spain and Austria.¹⁰⁵

The Federal Constitutional Court has competence to speak in other situations where the United States Supreme Court must remain silent. The German court can, for example, render an "advisory opinion" as to the constitutionality of a statute at the request of the govern-

102. The courts of last resort are federal courts; the first two instances are *Land* courts. See R. SCHLESINGER, *supra* note 100; Meador, *Appellate Subject Matter Organization: The German Design From an American Perspective*, 5 HASTINGS INT'L & COMP. L. REV. 27 (1982).

103. R. SCHLESINGER, *supra* note 100.

104. Rupp, *The Federal Constitutional Court and the Constitution of the Federal Republic of Germany*, 16 ST. LOUIS U.L.J. 359, 360-63 (1972); GG art. 93(1)(4a) (1949, amended 1968), 100(1). The English terminology is from R. SCHLESINGER, *supra* note 100.

105. The jurisdiction of the Spanish Constitutional Court under the 1978 constitution is described by Faller, *Verfassungsgerichtsbarkeit in Spanien*, 1979 EUGRZ 237; Faller, *Das Spanische Verfassungsgericht*, 29 JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART 279 (1980). For a discussion of the jurisdiction of the Italian Court, see Sandulli, *Die Verfassungsgerichtsbarkeit in Italien*, in VERFASSUNGSGERICHTSBARKEIT IN DER GEGENWART 292, 302-03 (H. Mosler ed. 1962). Austria's Constitutional Court is discussed in Melchiar, *Die Verfassungsgerichtsbarkeit in Österreich*, in *id.* at 439, 458-60, 469. The *Verfassungsbeschwerde* may be used in Austria only to protest administrative acts by the executive branch of government. See also Alexy, *Verfassungsbeschwerde*, in *id.* at 740; Bernhardt, *Normenkontrolle*, in *id.* at 727.

ment or of one third of the members of the *Bundestag*.¹⁰⁶ Procedures corresponding to this "*abstrakte Normenkontrolle*" exist in Spain, Italy, and Austria.¹⁰⁷ Of particular importance to this study is the power of the West German court to settle constitutional disputes between the other organs of the federal government in a proceeding known as an *Organstreit*. The *Organstreit* is established in article 93(1)(1) of the Bonn Constitution:

(1) The Federal Constitutional Court shall decide: 1. on the interpretation of this Basic Law in the event of disputes concerning the extent of the rights and duties of a highest federal organ or of other parties concerned who have been vested with rights of their own by this Basic Law or by rules of procedure of a highest federal organ. . . .¹⁰⁸

Article 93 empowers the Constitutional Court to resolve disputes between the federal executive and legislative branches concerning their respective powers under the Bonn Constitution. The object of the *Organstreit* must be a disputed interpretation of the written or unwritten principles of the constitution.¹⁰⁹ The controversy must arise from the concrete exercise of rights or duties under the constitution; the Court will not settle abstract disagreements between the other branches of government.¹¹⁰ Therefore, there must be a showing that, by virtue of an act or omission of the respondent organ, the complainant organ suffered injury or threat of injury to a constitutionally guaranteed right. The respondent organ's act or omission must have occurred in the context of its constitutionally prescribed functions. In short, the conflict must have arisen out of a legal relationship between the parties based on the constitution and with mutual rights and duties on each side. Those having standing to sue or be sued include the federal president, the *Bundestag*, the federal government, and members of these organs who have individual rights guaranteed to them as members of the organs. An individual deputy to the *Bundestag* thus has standing to sue as a party in an *Organstreit* with regard to injuries to his or her constitutional status as a deputy.¹¹¹

It is important to note that the decisions of the Constitutional

106. Rupp, *supra* note 95, at 553; GG art. 93(1)-(2).

107. See Faller, *supra* note 105, 29 JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART at 283; Sandulli, *supra* note 105, at 302; Melchiar, *supra* note 105, at 457.

108. T. MAUNZ, B. SCHMIDT-BLEIBTREU, F. KLEIN, & G. ULSAMER, BUNDESVERFASSUNGSGERICHTSGESETZ § 3, para. 39 (1979) [hereinafter cited as T. MAUNZ].

109. *Id.*

110. *Id.*

111. *Id.* § 63, paras. 9, 10.

Court in an *Organstreit* are only declaratory. This is to prevent the court from entering too deeply into political controversies.¹¹² Article 93 states that the decision of the Court is an *interpretation* arising out of a dispute between governmental organs. The decision thus merely declares whether a violation of the constitution has occurred, without addressing the concrete legal consequences of its interpretation.¹¹³ In an early case in which the court considered whether the Petersberg Agreement between the Federal Republic and the Allied High Commission should have been submitted to the *Bundestag* for confirmation, the Constitutional Court refused to decide whether or not the Agreement was void.¹¹⁴ The court only addressed the issue of conformance with the constitution.

The *Organstreit* enables the Federal Constitutional Court to pass judgment on issues which the United States Supreme Court would dismiss as "political questions."¹¹⁵ A former associate justice of the Constitutional Court has remarked that the existence of the *Organstreit* in the United States at the time of the *Steel Seizure Case*¹¹⁶ would have permitted the United States Congress to initiate proceedings against President Truman to have the Supreme Court decide whether the president's executive order seizing the steel industry encroached on legislative power.¹¹⁷ Likewise, in *Myers v. United States*,¹¹⁸ the *Organstreit* would have been the jurisdictional basis for an action by the United States Senate against the president for a Supreme Court ruling that the president had illegally dismissed an appointed government official without prior senate approval.¹¹⁹

The *Organstreit* has been characterized as "the most sensitive spot in the whole structure of the [Constitutional] Court's jurisdiction."¹²⁰

112. *Id.* § 67, para. 4; Lücke, *Die stattgebende Entscheidung im verfassungsgerichtlichen Organstreitverfahren und ihre Konsequenzen*, 1983 JZ 380.

113. T. MAUNZ, *supra* note 108, at § 67, para. 4. The duty of a governmental organ to take action to correct the constitutional violation after the court has spoken is an area of great uncertainty. One critic has stated that a duty to correct the illegal behavior when this is possible arises out of article 20(3) of the Bonn Constitution: "Legislation shall be subject to the constitutional order; the executive and the judiciary shall be bound by law and justice." Lücke, *supra* note 112, at 381.

114. Judgment of July 29, 1952, 1 BVERFGE 351 (1952), 1952 NJW 969.

115. There is no political question doctrine in West German jurisprudence. Zuck, *Political-Question-Doktrin, Judicial-self-restraint und das Bundesverfassungsgericht*, 1974 JZ 361.

116. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

117. See Rupp, *supra* note 95, at 548.

118. 272 U.S. 52 (1926).

119. Rupp, *supra* note 95, at 548.

120. Rupp, *Judicial Review in the Federal Republic of Germany*, 9 AM. J. COMP. L. 29, 43-44 (1960).

In arbitrating disputes between the highest governmental organs, the court undertakes the difficult task of isolating the legal issues from the political conflicts out of which they arise. Only the legal issues are subject to review, but the political color of a dispute will not prevent the court from applying legal standards to the legal issues.¹²¹ Critics of the *Organstreit* argue that the political branches of government may be tempted to evade their duty to reach political solutions to difficult issues by placing this burden upon the court.¹²² Some commentators have also noted that the spectacle of one high governmental organ reproaching the illegality of the actions of another before the Constitutional Court may erode public confidence in the political system.¹²³

On the other hand, the *Organstreit* is useful in that it allows the Court to diffuse a political dispute somewhat by narrowing it to a legal controversy.¹²⁴ The *Organstreit* also provides a check against unconstitutional action by the majority coalition in the legislature by providing the minority parties an avenue of protest after a parliamentary defeat.¹²⁵

The *Organstreit* is an unusual form of judicial review, even for nations which have a constitutional court similar to that of the Federal Republic. The new Spanish Constitutional Court is not competent to entertain constitutional disputes between organs of the government, although its jurisdiction is otherwise quite similar to that of its West German counterpart.¹²⁶ In Italy, the only justiciable controversies between governmental organs are those involving constitutional assignments of power over a given subject matter.¹²⁷ There is also no equivalent to the *Organstreit* in Austria. Austria's Constitutional Court may only adjudicate a limited class of jurisdictional disputes between the government and the Court of Accounts.¹²⁸

The early dissolution of the *Bundestag* in December 1982 clearly involved the sort of controversy which the *Organstreit* was designed to resolve. In its unanimous decision to take jurisdiction over the case,

121. *Id.* at 44.

122. *Id.*

123. The comment was made by Schüle in a discussion recorded in Sandulli, *supra* note 84 at 881-82.

124. Rupp, *supra* note 121, at 44.

125. This comment was made by Herlitz in a discussion recorded in Sandulli, *supra* note 84, at 877.

126. Faller, *supra* note 105, 1979 EuGRZ at 239 n.10.

127. Bräutigam, *Streitigkeiten zwischen obersten Staatsorganen*, in Sandulli, *supra* note 105, at 745; COSTITUZIONE DELLA REPUBBLICA ITALIANA [COST.] art. 134 (Italy).

128. Bräutigam, *supra* note 127, at 746-47 and Appendix at 963; BUNDES-VERFASSUNGSGESETZ art. 126a (Aus.).

the Federal Constitutional Court noted that the requisite concrete disagreement over the interpretation of article 68 of the Bonn Constitution had arisen out of the federal president's dissolution of the *Bundestag* before the expiration of the full legislative period. The president's exercise of the duties described in article 68 had ended the four-year mandate given to deputies to the *Bundestag* in article 39(1) of the Bonn Constitution. Although the four-year period is not guaranteed in the constitution, the deputies were entitled to protection against loss of the mandate through unconstitutional dissolution of the *Bundestag*. The rights and duties of the parties thus turned on the court's interpretation of article 68. Moreover, the federal president and the deputies were proper parties to the action by virtue of the statute governing the court's jurisdiction.¹²⁹

The substantive issues in the instant case also illustrate the institutional and political concerns addressed by the *Organstreit*. The political organs of the government had reached the decision to dissolve the *Bundestag* by means of the vote of confidence only after a great deal of consideration and debate. The public and the majority of deputies in the *Bundestag* wanted and expected a new election.¹³⁰ A decision by the Constitutional Court declaring the dissolution procedures illegal would have had serious political repercussions for all three branches of government. The federal president, the government and the *Bundestag* would have suffered a loss of public confidence for having "manipulated" the constitution. Furthermore, because the court's judgment would only have been declaratory, a delicate question would remain unanswered as to whether the scheduled elections would have to be cancelled.¹³¹ Any action taken in this case would have been unsatisfactory. Cancelling the elections would have disappointed the expectations of the general public, but a government put into office following an "illegal" election would face problems of legitimacy worse than those perceived by the new coalition in the fall of 1982. Finally, the uncertainty caused by a judgment against the dissolution of the *Bundestag* would doubtless have reflected poorly on the Constitutional Court as well as on the executive and legislative branches, raising un-

129. 1983 EuGRZ at 65-66. It is interesting to note that the court refused to take jurisdiction over complaints brought by individual voters based on the *Verfassungsbeschwerde* procedure described in note 104 *supra*. Judgments of Jan. 1, 1983 and Jan. 11, 1983, 1983 NJW 383. The individual voter has no protectable interest in the *Bundestag's* completion of the four-year legislative period.

130. See *supra* text accompanying note 30.

131. See *supra* note 113 and accompanying text.

comfortable questions about the court's authority to intervene in political affairs.

On the other hand, the decision of the Constitutional Court had the potential for bringing clarity to a situation where clarity was badly needed. The circumstances under which the 1982 dissolution occurred were unique in the short parliamentary history of the Federal Republic and neither the Bonn Constitution nor its legislative history provided absolute answers. The political parties, involved as they were with election campaigning, were in no position to reach disinterested, objective solutions. Allowing the Court to interpret the constitution in this case prevented the constitution from being altered in practice by a group of politicians more interested in political advantage than in constitutional principle.

All of the above political and institutional considerations played a role in the Constitutional Court's ultimate resolution of the dissolution controversy. Arguably, these pragmatic considerations were of greater importance to the Court's decision than were the purely theoretical constitutional arguments. The pragmatic factors should therefore be kept in mind as the discussion turns to the court's judgment on the merits of the case.

B. The Court's Decision

In its lengthy opinion sustaining President Carsten's decision to dissolve the *Bundestag*, the Constitutional Court first separated the reviewable legal issues from the nonreviewable political ones. The court determined that article 68 committed dissolution of the *Bundestag* to the discretion of the federal president, who could only exercise such discretion under the circumstances set forth in the constitution. The president's exercise of discretion was a political judgment and was not reviewable. Whether the factual prerequisites for the exercise of discretion had been fulfilled, however, was a separate legal issue which the court could address.¹³²

The appropriateness of the president's exercise of discretion in turn depended upon whether the federal chancellor had properly exercised his discretion to introduce the motion for a vote of confidence under article 68. Unconstitutional acts by the chancellor prior to the time that the request for dissolution reached the president would foreclose any action by the president. The court's major task thus became one of defining those circumstances under which the federal chancellor

132. 1983 EuGRZ at 66.

could constitutionally pose the motion for a vote of confidence.¹³³

Since the express language of article 68 does not address the prerequisites for a vote of confidence in the *Bundestag*, the court was obliged to seek the "unwritten material factual criteria" applicable to the provision.¹³⁴ The four methods of interpretation employed in this effort include: 1) analysis of the language and structure of article 68, 2) examination of the historical background of the provision as seen in the light of German constitutional history, 3) analysis of the interrelationship of article 68 with other relevant provisions of the constitution (the "normative context"), and 4) reference to constitutional practice in the Federal Republic since 1949. The court developed its unwritten constitutional criteria using these methods of interpretation.

In concluding that the wording of article 68 was not clear as to the factual prerequisites for the vote of confidence, the court focused on the use of the words "confidence" (*Vertrauen*) and "no-confidence" (*Miss-trauen*) as used in articles 67 and 68. Contrary to the argument of the complainants, the court did not construe the word "confidence" to require that the chancellor ask for a vote of confidence with the sole purpose of securing the support of the majority in the legislature. Rather, the court relied on the notion of "confidence" dating back to the 1918 amendment to the Constitution of 1871, in which the chancellor's status was changed so that the office was dependent upon the support of a majority in the parliament rather than the support of the monarch alone.¹³⁵ Viewed in this light, a failure of members of the *Bundestag* to express "confidence" in the chancellor does not necessarily imply that they are passing a final moral judgment upon the chancellor's ability to carry out the duties of office. Rather the use of the word "confidence" in article 68 leaves open the possibility that disapproval of the government's policies may not be the only reason a deputy fails to support the chancellor in a vote of confidence. The court held:

[I]n the context of article 68 "confidence" means the contemporaneous agreement of the member of parliament to the person and program of the federal chancellor, formally declared in the act of casting his vote. . . . That this "confidence" can be put into question in a parliamentary system by the members of parliament with every new political development, and therefore is by its very nature not permanently secured . . . is obvious . . . in light of the guarantee in article

133. *Id.*

134. *Id.* at 68. The Court used the term "ungeschriebenes sachliches Tatbestandsmerkmal." (All translations from the opinion are by the author.)

135. See *supra* text accompanying note 42.

38(1)(2) of the Bonn Constitution of the free representative mandate. . . . Article 68 applies to every federal chancellor, not solely to the "minority chancellor" who strives for new elections. . . . The words of the text alone do not foreclose the possibility that behind the vote of confidence, the political will may have existed from the outset to effect dissolution of the *Bundestag* in this way.¹³⁶

By analyzing the structure of article 68, however, the court determined that the drafters of the Bonn Constitution had intended to make the dissolution of the *Bundestag* difficult in order to promote government stability. "The intent [of article 68] is to hinder the precipitous dissolution of the *Bundestag*, and thereby to promote political stability—without inflexibility, of course—in the relationship between the Chancellor and the *Bundestag*."¹³⁷ To insure that the dissolution of the legislature be a carefully considered, necessary action, article 68 requires that the federal chancellor, president, and *Bundestag* all take part in the decision. Article 68 requires that each organ exercise its independent judgment. The chancellor must decide to ask for the vote of confidence; each deputy is free under article 38 to vote on the motion as his or her conscience dictates, and the president must finally exercise discretion in ordering the dissolution.¹³⁸

In addition, article 68 provides several escape routes should dissolution later become unnecessary. For example, the *Bundestag* can interrupt the proceeding from the outset by electing a new chancellor under the constructive vote of no-confidence in article 67.¹³⁹ This election extinguishes the president's right to grant a request to dissolve

136. 1983 EuGRZ at 66-67. The Court's opinion reads as follows:

Auch im Rahmen des Art. 68 GG meint Vertrauen die im Akt der Stimmabgabe förmlich bekundete gegenwärtige Zustimmung der Abgeordneten zu Person und Sachprogramm des Bundeskanzlers. . . . Daß im parlamentarischen System dieses "Vertrauen" mit jeder neuen Beurteilung und Einschätzung der gegebenen politischen Lage, durch die Abgeordneten in Frage gestellt werden kann, also von Natur aus nicht auf Dauer versichert wird, versteht sich letztlich im Blick auf die Gewährleistung des repräsentativen freien Abgeordnetenmandats in Art. 38 Abs. 1 Satz 2 GG von selbst. . . . Art. 68 GG gilt für jeden Bundeskanzler, nicht lediglich für den "Minderheitskanzler", der Neuwahlenanstrebt. . . . Der Wortlaut allein schließt es nicht aus, daß hinter der Vertrauensfrage von vornherein der politische Wille stehen darf, auf diesem Wege zur Auflösung des Bundestages zu gelangen. . . .

137. *Id.* at 67. The court stated: (Die in Art. 68 GG Angelegte Systematik) will eine verschnele Auflösung des Bundestages verhindern und damit zu politischer Stabilität im Verhältnis von Bundeskanzler und Bundestag freilich nicht zu politischer Unbeweglichkeit beitragen.

138. *See supra* note 9.

139. *Id.*

brought by the defeated chancellor. The federal president can also stop the dissolution proceedings by refusing to comply with the chancellor's request for dissolution. The president's right to dissolve is automatically extinguished if the chancellor's request is not acted upon within 21 days. A chancellor who loses a vote of confidence is not required to ask for dissolution, but may continue in office as head of a minority government. The chancellor can also prevent dissolution at the last minute by refusing to countersign the dissolution order as required under article 68 of the Constitution.¹⁴⁰

In analyzing the historical background of article 68, the court compared the Bonn Constitution with its historical antecedents and investigated its legislative history.¹⁴¹ Similar to its construction of the wording and structure of article 68, the court concluded that although the Bonn Constitution does not require the chancellor to have lost the majority in the *Bundestag* before posing the motion for a vote of confidence, the use of this device to achieve dissolution is not unlimited.

Comparison of the 1949 Bonn Constitution with the 1919 Weimar Constitution revealed to the court that the Bonn Constitution had been planned with the stability of the government in mind. The court noted, for example, that the "destructive" vote of no-confidence allowed under the Weimar Constitution had been replaced in 1949 by the "constructive" vote in article 67, which was designed to prevent the opposition from toppling one government without replacing it with a new one capable of conducting state affairs. Moreover, the nearly unlimited

140. 1983 EuGRZ at 67.

141. The court made the following remarks as to the role of the legislative history in its construction of the Bonn Constitution:

The Federal Constitutional Court has repeatedly declared with respect to laws not having constitutional stature that the legislative materials should be drawn upon with caution, only to support an interpretation, and collectively only insofar as they lead to conclusions about the 'objective substance of the statute. . . .' The so-called will of the legislator . . . can be accordingly considered in the interpretation only insofar as it has found expression in the text. The legislative materials may not mislead the reader to equate the subjective concepts of the legislative stage with the objective substance of the statute.

It is unclear whether these principles may also apply in the same fashion to constitutional norms, because the openness of the text is more of a problem with the interpretation of the constitution than it is with the interpretation of a law of lesser stature. . . . Particularly with regard to the organizational part of the constitution to which article 68 belongs, the task of constitutional interpretation is understood to allow room for varying formal possibilities. . . . Nonetheless, the legislative history of a constitutional norm cannot remain completely unconsidered. . . . In any case, the legislative materials are as a rule not given determinative meaning [in constitutional interpretation].

Id. at 69.

right of the Weimar president to dissolve the parliament had been sharply curtailed to the situations described in articles 63 and 68 of the Bonn Constitution. Nonetheless, the court could not conclude from these changes alone that dissolution under the instant fact situation was entirely forbidden by the Bonn Constitution.¹⁴² "From the point of view of constitutional history, the thrust of article 68 is not primarily against a right to self-dissolution by the *Bundestag*; rather, it is against the *unlimited* right to dissolve that was in practice . . . enjoyed by the president under the Weimar Constitution. . . ."¹⁴³

The court's examination of the legislative history of the Bonn Constitution as contained in the documents of the parliamentary council led it to a similar conclusion. The discussion of article 68 by members of the council centered upon the role which it would play in the case of a chancellor who had lost the majority in the *Bundestag*. Other scenarios were not considered at length. The court did not imply from this fact, however, that the council had intended article 68 only for use by a minority chancellor.

That article 68 should only be employed in the cases discussed by the parliamentary council, and that it should only open the way for new elections in those cases, cannot be established. The legislative intent was to create a norm which would define limits without unduly restricting the freedom necessary to the political process, and which would exorcise the dangers to the stability of the new republic apparent upon retrospective consideration of the Weimar Republic. The intent was not to design a "cure-all" for all imaginable conflicts. Rather, the drafters wished to create a provision that would effectively insure against all misuse . . . by requiring the participation of chancellor, *Bundestag* and president. . . .¹⁴⁴

Although the court's analysis of the historical background and in-

142. *Id.* at 68.

Verfassungsgeschichtlich gesehen geht die Stoßrichtung des Art. 68 GG nicht in erster Linie gegen ein Selbstauflösungsrecht des Bundestages, sondern gegen das praktisch unbegrenzte Auflösungsrecht. . .

143. *Id.*

144. *Id.* at 69.

Daß Art. 68 GG *nur* auf die im Parlamentarischen Rat angesprochenen Fallgestaltungen Anwendung finden und *nur* insoweit einen Weg zu Neuwahlen eröffnen sollte, läßt sich sonach nicht feststellen. Man wollte eine Norm schaffen, die Grenzen setzt und die im Rückblick auf Weimar vor Augen stehenden Gefahren für die Stabilität der neuen Republik bannen sollte, ohne den notwendigen politischen Freiraum über Gebühr einzuschränken. Nicht eine "Patentlösung" für alle denkbaren Konfliktsfälle sollte geschaffen werden, sondern eine Bestimmung, die durch ihre besondere Ausgestaltung, die Beteiligung von Bundeskanzler, Bundestag und Bundespräsident mit den daraus folgenden Wech-

ternal structure of article 68 led it to conclude that a majority chancellor was not foreclosed from using the vote of confidence mechanism for early dissolution of the *Bundestag*, these methods of interpretation did not clearly define the limits on the chancellor's actions. The court found the definition of these boundaries in the "normative context" of article 68, that is, in its interaction with other provisions of the Bonn Constitution relevant to the dissolution issue. The provisions considered by the court were articles 63, 67, and 39.

The court's reading of article 63(4) together with article 68 led it to conclude that early dissolution under these provisions was intended to be used as a threat to coerce members of the *Bundestag* to choose a majority chancellor or face losing their seats in a new election. The purpose of this threat was to force the formation of a government capable of conducting state business. Therefore, the possibility of early dissolution could only be available where there is a question as to the government's effectiveness.¹⁴⁵

It does not do justice to the purpose of article 68 to construe it to permit a federal chancellor certain of a sufficient majority in the *Bundestag* to ask for a negative response to a vote of confidence in order to effect the dissolution of the *Bundestag* at a time which appears convenient to him. Likewise, particular difficulties in performing the tasks which arise during the course of the legislative session do not justify dissolution.¹⁴⁶

The court further determined that articles 67 and 38(1) foreclosed the use of article 68 to "legitimize" a decision reached by the government in a constitutionally permissible manner. The court recalled that the principles of "representative democracy" in article 38(1) permitted a member of the *Bundestag* to vote according to the dictates of his or her conscience without the need to return to his or her constituents for approval. This principle was evidenced by the fact that the constructive vote of no-confidence in article 67 provided for the election of a new chancellor without requiring approval of the choice by the voters.

selwirkungen und Prüfungspflichten eine greifende Sicherung gegen jeden Mißbrauch gewährleistet.

145. *Id.* at 68.

Eine Auslegung dahin, daß Art. 68 GG einem Bundeskanzler, dessen ausreichende Mehrheit im Bundestag außer Zweifel steht, gestattet, sich zum geeignet erscheinenden Zeitpunkt die Vertrauensfrage negativ beantworten zu lassen mit dem Ziel, die Auflösung des Bundestages zu betreiben, würde dem Sinn des Art. 68 GG nicht gerecht. Desgleichen rechtfertigen besondere Schwierigkeiten der in der laufenden Wahlperiode sich stellenden Aufgaben die Auflösung nicht.

146. *Id.*

In particular, it is a fundamental misunderstanding of the meaning of article 68 and the constitutionally embodied principle of representative democracy to demand dissolution of the *Bundestag* and new elections with the assertion that a chancellor elected by means of a constructive vote of no-confidence needs legitimacy procured through new elections in addition to his constitutional legality.¹⁴⁷

Finally, the court interpreted the four-year legislative period set forth in article 39 as further evidence that the *Bundestag* should only be dissolved when the government was no longer capable of effectively performing its duties.

Article 39(1) sentence 1 of the Bonn Constitution *gesetz* is not merely a technical determination . . . for the periodic renewal of the mandate of the representatives. It is also intended to secure the effectiveness of the parliament in a modern mass democracy. It should only be possible to shorten the legislative period under the peculiar, grave circumstances prescribed in articles 63(4) and 68. . . .¹⁴⁸

In light of the above interpretations of article 68 in connection with articles 63(4), 67, and 39, the Constitutional Court set forth the following standard for the invocation of article 68.

The federal chancellor who attempts to dissolve the *Bundestag* by means of article 68 should be permitted to employ this procedure only when he no longer has the political assurance that he can govern further given the political constellation that exists in the *Bundestag*. The political constellation in the *Bundestag* must impair or cripple his ability to act to such an extent that he is significantly unable to pursue a political program supported by a stable majority. These are the unwritten material factual criteria set forth in article 68. They must be met in order for an individual proceeding under article 68 to be in accordance with the constitution.¹⁴⁹

147. *Id.* In German:

Insbesondere verfehlt es grundlegend den Sinn des Art. 68 GG wie der vom Grundgesetz geformten repräsentativen Demokratie, die Auflösung des Bundestages und Neuwahlen mit der Behauptung zu fordern, ein über ein konstruktives Mißtrauensvotum neu gewählter Bundeskanzler bedürfe neben seiner verfassungsmäßigen Legalität noch einer durch Neuwahlen vermittelten Legitimität.

148. *Id.* at 69. The German text reads:

Art. 39 Abs. 1 Satz 1 GG ist nicht lediglich eine wahltechnisch gemeinte Festlegung für die vom Demokratiegrundsatz geforderte periodische Erneuerung der Mandate der Volksvertreter. Sie will auch die Arbeitsfähigkeit des Parlaments in einer modernen Massendemokratie sichern. Die Wahlperiode abzukürzen, soll nur aus besonderen und schwerwiegenden Gründen, wie sie in Art. 63 Abs. 4 Satz 3 GG und Art. 68 festgelegt sind, möglich sein. . . .

149. *Id.* at 68.

The court cited political practices in the Federal Republic since 1949 as evidence to support its standard. The only precedent for early dissolution under article 68 was the 1972 vote of confidence requested by Chancellor Willy Brandt. The procedures in articles 81 and 63(4) had never been used and the constructive vote of no-confidence had only been attempted twice; once unsuccessfully in 1972 and again in 1982 to elect Helmut Kohl. This finding demonstrated the restraint with which the dissolution procedures had been employed. The practice of the West German political organs expressed a strong preference for forming an effective parliamentary majority by means other than returning to the voters. The court, however, explained the exceptional 1972 dissolution by noting that Chancellor Brandt had used the article 68 procedure as a crisis management device after he had lost his majority in the *Bundestag*. Brandt's actions had not brought about a change of the constitution in practice; they had been fully in accordance with the requirements of article 68.¹⁵⁰

In applying its dissolution standard to the facts at hand, the Constitutional Court held that Chancellor Kohl's motion for a vote of confidence was constitutionally permissible because he was faced with a crisis situation similar to that faced by Chancellor Brandt in 1972. The court held that, "because of the extraordinary situation in which the deputies of one of the coalition parties found themselves after the collapse of the former coalition, the federal chancellor had reason in December 1982 to believe that a lasting, stable parliamentary majority could no longer be brought into existence."¹⁵¹ As evidence for the "extraordinary situation," the court cited the upheaval which had occurred in the *FDP* following the termination of its partnership with the *SPD*. The change of coalition partner caused a great deal of strife within the party, and in the *Land* elections between September and December

Der Bundeskanzler, der die Auflösung des Bundestages auf dem Weg des Art. 68 GG anstrebt, soll dieses Verfahren *nur* anstrengen dürfen, wenn es politisch für ihn nicht mehr gewährleistet ist, mit den im Bundestag bestehenden Kräfteverhältnissen weiter zu regieren. Die politischen Kräfteverhältnisse im Bundestag müssen seine Handlungsfähigkeit so beeinträchtigen [sic] oder lähmen, daß er eine vom stetigen Vertrauen der Mehrheit getragene Politik nicht sinnvoll zu verfolgen vermag. Dies ist ungeschriebenes sachliches Tatbestandsmerkmal des Art. 68 Abs. 1 Satz 1 GG; es muß erfüllt sein, damit ein Verfahren nach Art. 68 GG im Einzelfall verfassungsgemäß ist.

150. *Id.* at 70.

151. *Id.* at 71. "Der Bundeskanzler hatte im Dezember 1982 Anlaß, davon auszugehen, daß aufgrund der außergewöhnlichen Lage, in der sich die Abgeordneten einer Koalitionspartei nach der Beendigung der bisherigen Koalition befanden, eine dauerhafte stabile parlamentarische Mehrheit nicht zustande gebracht werden konnte."

1982, the *FDP* lost its seats in three of the *Landtage* (Hessen, Bavaria, and Hamburg).¹⁵² Further proof of Kohl's wavering majority was the fact that the *CDU/CSU* and *FDP* had only been able to agree to limited cooperative measures to correct the economic course of the nation. The parties had not agreed on detailed, long-range plans and had expressed unwillingness to do so without new elections. These factors made it plausible that Chancellor Kohl had posed the motion for a vote of confidence out of concern for his majority.¹⁵³ The court found consideration of other possibly unconstitutional motivations, such as the desire to bring "legitimacy" to the new government, irrelevant.¹⁵⁴

Five of the Constitutional Court's eight justices joined the majority opinion. Justice Rottmann filed a separate opinion supporting the majority's theoretical discussion, but disagreeing with the court's finding that the facts supported the majority's conclusion. In Justice Rottmann's view, the fact that the leaders of the *CDU/CSU* and *FDP* had agreed to March elections as a condition of the coalition agreement militated against an interpretation that Kohl's parliamentary base had become shaky by December 1982.¹⁵⁵ Kohl's success at passing the 1983 budget on the day prior to his request for a vote of confidence was further evidence that he possessed a secure majority and a factor which distinguished his case from Chancellor Brandt's 1972 stalemate.¹⁵⁶ Finally, Justice Rottmann refused to accept as proof of a faltering parliamentary base the government's argument that the coalition had been formed on a limited basis to reach only immediate stopgap solutions to the nation's economic woes.¹⁵⁷ In Justice Rottmann's opinion, such agreements were unforeseen in the Bonn Constitution and could not be used to fabricate a crisis.¹⁵⁸

Justice Zeidler agreed in his separate opinion that the dissolution of the *Bundestag* was within the limits of the constitution, but based his conclusions on a different theoretical premise. Like Justice Rottmann, he considered the "limited assignment" theory a faulty basis for legisla-

152. *Id.* at 71-72.

153. *Id.* at 73.

154. *Id.* As to other motives, the court stated:

The question of whether the Chancellor's decision was accompanied by other motives is not determinative. Article 68 requires along with its procedural prerequisites and substantive criteria no additional negative prerequisite such as the absence of further motivations which taken alone would not be constitutionally acceptable grounds for the dissolution of the *Bundestag*.

155. *Id.* at 87.

156. *Id.* at 87-88.

157. *See supra* note 23.

158. 1983 EuGRZ at 88.

tive emergency because the theory was not constitutionally permitted.¹⁵⁹ In Justice Zeidler's opinion, permitting such agreements would allow the political parties to shorten the legislative period to suit their wishes, in effect changing the constitution in violation of article 79(1). To support the dissolution, Justice Zeidler identified a different legislative emergency. He declared that a change in constitutional purpose (*Bedeutungswandel*) affecting the role of the chancellor had occurred in practice since the founding of the Federal Republic. The drafters of the constitution had imagined that the voters would not participate directly in electing the chancellor; under the theory of representative democracy, the voters entrusted this duty to the deputies of the *Bundestag*. Justice Zeidler argued that, in reality, the election of the chancellor proved to be the major concern of the voters, who cast their votes for deputy with an eye to whom the deputies would elect as chancellor. Justice Zeidler noted that during the 1980 campaign, the *FDP* had used the slogan "A vote for the *FDP* guarantees that Helmut Schmidt remains chancellor." Such practices had introduced elements of direct democracy into the election process, and a drastic change in the policy of a political party halfway through the legislative session could result in unrest among the voters who had cast their ballots with certain expectations. In short, a new coalition might need "legitimization" in order to function effectively.

In this light, it appears plausible that a chancellor called into office under article 67 might feel burdened with a lack of credibility that detracts from the authority of his office. Skepticism among members of the general public could penetrate into the circle of his own organized supporters, and cripple his political effectiveness by giving him the reputation of a 'second-rate chancellor.'¹⁶⁰

In the third and final opinion, Justice Rinck, using the same ana-

159. *Id.* at 75.

160. *Id.* The German text reads:

Vor diesem Hintergrund erscheint es plausibel, daß ein gemäß Art. 67 GG ins Amt berufener Bundeskanzler sich mit einem Glaubwürdigkeitsdefizit behaftet fühlen mag, das seine Amtsautorität mindert. Skepsis in der Bevölkerung allgemein könnte durchschlagen bis in den Kreis der eigenen organisierten Anhängerschaft und durch den Ruch eines "Kanzlers zweiter Güte" die politische Handlungsfähigkeit lähmen.

The German voter has two votes in the election to the *Bundestag*. The first vote operates to directly elect an individual candidate to the *Bundestag*. The second vote is for the party list. This vote decides the proportional strength of each party in the *Bundestag*; parties receiving less than five percent of the second votes may not be represented in the *Bundestag*. In practice, the second vote has become much more important than the first vote. See Bundeswahlgesetz (Federal Election Law) of May 7, 1956, 1956 BGBI I 393, §§ 1-7.

lytical techniques that were employed by the majority, concluded that the early dissolution was unconstitutional. In Justice Rinck's view, the use of the word "confidence" in article 68 meant that "[t]he government comes into office and remains in office if and for as long as it is supported by the majority of the members of parliament."¹⁶¹ Seen in this light, the text of article 68 forecloses an agreement between the chancellor and his supporters in the *Bundestag* that the chancellor be defeated on the vote of confidence to advance the chancellor's political purpose to dissolve the *Bundestag*. Article 68 can only be used when there is a genuine question of confidence in the government.¹⁶²

Justice Rinck's analysis of the legislative history of article 68 also proved that "a dissolution of the *Bundestag*—under article 63(4) or article 68—should only be possible when the *Bundestag* is not able to build an effective government."¹⁶³ In support of this conclusion, Rinck cited extensive passages from the records of the parliamentary council in which the drafters of the Bonn Constitution expressed concern over instability caused by a government with a shaky basis of support in the parliament.¹⁶⁴

Like the majority, Justice Rinck's interpretation of article 68 in its "normative context" required extreme circumstances before the provision could be used as a mechanism for early dissolution.

Articles 63, 67, 68, and 81 as seen together build a system of mutual checks and balances. The goal of this balanced system is to insure that the tasks of the government are always carried out by an effective executive branch. . . . A dissolution of the *Bundestag* under article 68 despite the continuing existence of a majority capable . . . of building a government by electing a chancellor candidate under article 67 would turn the balanced system of articles 63, 67, 68, and 81 on its head.¹⁶⁵

Proof that this system had not been altered through practical applica-

161. *Id.* at 76. In German: "Die Regierung kommt ins Amt und bleibt im Amt, wenn und solange sie von einer Mehrheit der Mitglieder des Parlaments getragen wird."

162. *Id.*

163. *Id.* at 85. In German: "Die Entstehungsgeschichte erweist somit *eindeutig*, daß eine Auflösung des Bundestages—nach Art. 63 Abs. 4 oder nach Art. 68 GG—nur möglich sein sollte, wenn der Bundestag nicht in der Lage wäre, eine handlungsfähige Regierung zu bilden."

164. *Id.* at 80-84.

165. *Id.* at 77. The German text reads: "Art. 63, 67, 68 und 81 GG bilden zusammen gesehen ein System der gegenseitigen Gewaltenhemmung. Ziel dieses ausbalancierten Systems ist, daß die Regierungsaufgaben stets von einer handlungsfähigen Exekutive wahrgenommen werden. Insofern kommt der Auflösung des Bundestages, die an enge Tatbestandsvoraussetzungen geknüpft ist, nur eine begrenzte Funktion zu."

tion was found in the fact that the *Enquête* Commission's 1976 proposal for a self-dissolution amendment had not been passed by the *Bundestag*. In Justice Rinck's opinion, this confirmed that the possibilities for dissolution were still limited to those available under the Bonn Constitution as drafted in 1949. The creation of a broader right of dissolution was permissible only through passage of an amendment under article 79 of the Bonn Constitution.¹⁶⁶

Finally, Justice Rinck disagreed with the majority that the 1972 dissolution under the Brandt government was of precedential value in the instant case. Like Justice Rottmann, Justice Rinck was of the opinion that the situation in 1972 was distinguishable in that the Brandt government had been unable to find a majority in the parliament for its proposed budgetary legislation. This was not the case for Chancellor Kohl in 1982.¹⁶⁷ Justice Rinck also agreed with Justices Rottmann and Zeidler that governmental instability could not be based on the "limited assignment" purportedly undertaken by the coalition partners at the time that Chancellor Kohl was elected.¹⁶⁸ Justice Rinck proposed the following standard to govern the use of article 68 in dissolving the *Bundestag*:

The dissolution of the *Bundestag* is only permissible under article 68 when there is no majority with the capacity to govern, or when it has become uncertain if such a majority exists. . . . [A] dissolution of the *Bundestag* does not come into question when, solely because he anticipates that a party caucus which has been supporting him will not continue to completely go along with his future political plans, the chancellor poses a vote of confidence, and with the agreement of his political supporters allows the vote to be defeated in order to open the possibility of new elections. As long as the failure of the vote of confidence is not the expression of a current crisis in the government which has caused the government to lose its ability to carry out its political intentions with the support of the majority of the parliament, the legal prerequisites for a dissolution of the *Bundestag* are lacking.¹⁶⁹

166. *Id.* at 79. The first sentence of article 79 states: "This Basic Law can be amended only by laws which expressly amend or supplement the text thereof."

167. *Id.* at 79-80.

168. *Id.* at 79.

169. *Id.* at 85.

Alle Auslegungsmethoden führen damit übereinstimmend zu dem Ergebnis, daß die Auflösung des Bundestages nach Art. 68 GG nur zulässig ist, wenn eine regierungsfähige Mehrheit fehlt oder unsicher geworden ist. Von daher erschließt sich der Sinn der Vertrauensfrage: Es soll festgestellt werden, ob die Regierung tatsächlich noch über die erforderliche parlamentarische Unterstützung verfügt.

A close reading of the Constitutional Court's four opinions reveals that all of the eight justices were in general agreement as to the theoretical legal prerequisites for posing the vote of confidence; they all required that the chancellor be faced with some extraordinary legislative emergency. The chancellor who requests a vote of confidence must do so with the proper motivation. The provisions of article 68 may be used for purposes other than consolidating a parliamentary majority only where the government is faced with a crisis making it impossible for state business to be effectively carried out. The real division in the court arose over the factual situations which would give rise to a chancellor's inability to perform. For some of the justices, a stalemate situation such as that which Chancellor Brandt faced in 1972 was a sufficient crisis. For others, notably Zeidler, a lack of public confidence in the chancellor could also cause such a crisis.

The problem of applying legal theory to the instant fact situation vividly illustrates the difficulty of the Constitutional Court's position when it exercises jurisdiction to review conflicts between the political organs of the government. On the one hand, it is the court's duty to interpret the constitution and to guard against illegal manipulation of its provisions by the political organs of government. On the other hand, the court must realize that in the adjudication of disputes over the rights and duties of the political organs, the credibility of these organs is at stake. Tarnishing the credibility of the highest governmental organs could easily damage public confidence in the entire constitutional system. Given a young democracy such as the Federal Republic, both of these considerations are particularly important. The institution of the *Organstreit* in fact reflects the concern that a balance be maintained between control and credibility. Permitting the Constitutional Court to state the law regarding interdepartmental disputes without giving it the power to declare particular acts legally void can be seen as an attempt to reconcile the problems of reviewing the acts of other gov-

Wird die Vertrauensfrage nicht mit diesem Ziel gestellt, vermag eine Abstimmungsniederlage des Bundeskanzlers die Auflösung des Bundestages nicht zu rechtfertigen. Insbesondere kommt eine Auflösung des Bundestages auch dann nicht in Betracht, wenn ein Bundeskanzler lediglich aus der Befürchtung, daß eine der ihn stützenden Fraktionen seine für die Zukunft geplante Politik nicht vollständig mittragen werde, die Vertrauensfrage stellt und sich im Einverständnis seiner parteifreunde das erbetene Vertrauen verweigern läßt, um auf diese Weise den Weg zu Neuwahlen zu eröffnen. Solange die Abstimmungsniederlage nicht Ausdruck einer gegenwärtigen Regierungskrise ist, in der die Bundesregierung ihre Fähigkeit eingebüßt hat, mit Unterstützung der Mehrheit des Parlaments politische Vorhaben durchzusetzen, fehlen die rechtlichen Voraussetzungen für eine Bundestagsauflösung.

ernmental organs with the perceived necessity for such review.¹⁷⁰

Despite the need for judicial review and the institutional hedges, the problems involved with passing legal judgment on acts intimately tied to the political process are exceedingly difficult. The majority opinion's treatment of the facts in the instant case can best be understood as a product of this dilemma. The majority opinion's comparison of the situation of the Kohl government in 1982 with that of the Brandt government in 1972 represents a naked manipulation of the facts in order to bring Chancellor Kohl's motion for a vote of confidence within the limits which the Court drew for article 68. The majority failed to meet the argument advanced by Justices Rinck and Rottmann that the 1972 dissolution was quite unlike the dissolution of 1982. Brandt had lost his parliamentary majority in 1972; the same cannot be said of Chancellor Kohl. By analogizing the Kohl dissolution to the Brandt dissolution, however, the court avoided the awkward position of embarrassing the federal president, the chancellor, and *Bundestag* by declaring their actions unconstitutional. At the same time, the standard set forth in the majority opinion could be seen as a warning to future governments that attempts to dissolve the *Bundestag* without the proper factual basis would be looked upon with disfavor by the court. According to Ernst Benda, the president of the court (who did not participate in the judgment), the majority opinion evidenced the clear intent that the court "will not allow the dam to break."¹⁷¹

The problems of applying legal theory to political problems can be seen in the majority opinion's theoretical analysis as well as in its evaluation of the facts. The majority opinion was the court's first definitive statement in an area which had been subject to question since 1950. It did not eliminate all the doubts concerning early dissolution under article 68. One issue raised by the commentators during the months prior to the court's decision was the extent to which the court could test the motivations of the chancellor who poses the motion for a vote of confidence.¹⁷² The court's requirement that the chancellor be in doubt of his or her ability to effectively control the government presumes that the court can test whether the chancellor's perception of the political climate is honest and correct. While the evidence in this case gives a fairly clear indication that Chancellor Kohl had a secure parliamentary base, cases in which the evidence is not so clear can certainly be imagined. Absent clear, objective evidence, it would be hard to deter-

170. See *supra* text accompanying notes 112-114.

171. *Die Dämme nicht brechen lassen*, DER SPIEGEL, Feb. 21, 1983, at 17, 20.

172. See *supra* text accompanying note 68.

mine the legality of the chancellor's purpose.¹⁷³

Furthermore, testing the chancellor's motives may indirectly involve the impossible task of testing the motives of the deputies who vote or fail to vote for the chancellor. Even if the deputies' motives could objectively be determined, such an attempt would arguably violate the protection of the deputies' freedom of conscience as guaranteed in article 38 of the Bonn Constitution.¹⁷⁴

The majority opinion also does not adequately take into account the fact that a chancellor may have multiple motives for desiring dissolution, not all of which meet the majority opinion's tests. The majority's statement that only *one* of the chancellor's motives be constitutionally acceptable¹⁷⁵ leaves open the possibility that a chancellor may fabricate a "proper" motive to accompany improper ones, leaving the court with the problem of determining whether the "proper" motive is plausible enough to support the chancellor's actions.¹⁷⁶

Requiring the chancellor to justify a request for dissolution by accounting for its motivation is an unusually strict measure in light of other Western European parliamentary systems. In no other Western European nation is the head of state required by law to state a motivation for requesting early dissolution. In fact, most nations do not prescribe in their constitutions any particular conditions for dissolution as restrictive as those in the Bonn Constitution. Leaders of these Western European nations generally state their motivations for dissolution in practice, but such rationales are not subject to judicial scrutiny. The decision to dissolve the legislative body is left to the discretion of the political leaders.¹⁷⁷

A further problem is raised by the court's insistence that a dissolution of the *Bundestag* cannot be justified by the desire to submit a controversial political decision to the voters for "legitimization." Only Justice Zeidler recognized that the pressure for more direct public participation in important political decisions was of great significance in explaining the actions of the *CDU/CSU* and *FDP* in the fall and winter of 1982.¹⁷⁸ Continued failure by the court to admit that this element plays a role in West German politics may prove to be unrealistic, espe-

173. See Gusseck, *Bundestagsauflösung kraft Richterspruch?*, 1983 NJW 721.

174. See *supra* text accompanying notes 54-55.

175. See *supra* note 154 and accompanying text.

176. See Gusseck, *supra* note 173, at 723.

177. K. VON BEYME, *supra* note 63, at 853.

178. See *supra* text accompanying note 160.

cially as West Germans become more experienced with the democratic process. In future cases similar to the instant case, for example, the court's attitude toward the legitimization problem may inhibit the use of the constructive vote of no-confidence to place a more effective chancellor into office. Political parties concerned about their relationship with the voters may be more reluctant to change coalition partners without the possibility of submitting their actions to scrutiny by the voters. The desire for increased public participation has been expressed in the past and is likely to grow in the future. This desire is a force that will have to be accounted for in the political system, at least with regard to the election of the chancellor.

Although the decision of February 16, 1983 left certain thorny problems unresolved for the future, it met the immediate need of determining whether or not the March 6 election was constitutionally permissible. The court's judgment was welcomed by President Carstens and by the leaders of all the political parties, who set about campaigning in earnest.¹⁷⁹ On March 6, 1983, with 89.1 percent of the eligible voters participating, the *CDU/CSU* won a decisive majority of 48.8 percent of the votes, a 4.3 percent gain from the 1980 election. The *SPD* obtained 38.2 percent of the votes, a drop of 7.2 percent from 1980. The *FDP* was able to overcome the five percent hurdle with 6.9 percent of the votes, a loss of 4 percent from 1980. The "Greens" also won a place in the parliament for the first time, capturing 5.6 percent of the vote.¹⁸⁰ The election results confirmed the decisive shift in West German domestic policy which had occurred in the fall of 1982.

While the effects of the March election results were immediately felt on the West German political scene, the events leading up to the election will doubtless have an equally important, if more subdued, impact on the character of the Federal Republic. With regard to future early dissolution, it remains to be seen in practice whether, as Justice Benda terms it, the "dam" will hold under the current state of the law, or whether, as one prominent commentator has noted, "the locks are open."¹⁸¹ It seems likely in any case that the new government will consider a constitutional amendment in this area; a well-drafted, carefully considered change might end the uncertainty over early dissolution once and for all.

179. See, e.g., Mörbitz, *Bundespräsident sieht sich bestätigt*, *Frankfurter Rundschau*, Feb. 17, 1983, at 1.

180. *Die Wende ist perfekt*, *DER SPIEGEL*, March 7, 1983, at 9.

181. Leicht, *Die Richter haben sich gebeugt*, *Süddeutsche Zeitung*, Feb. 17, 1983, at 4.

III. A LOOK AHEAD

The most likely resolution of the dilemma left in the wake of the dissolution controversy appears to be an amendment to the Bonn Constitution allowing for self-dissolution of the *Bundestag*. Such an amendment was suggested by Willy Brandt in 1966 following the upheaval in the Erhard government¹⁸² and was proposed again in 1976 by the *Enquête* Commission in response to the controversy over the 1972 dissolution.¹⁸³ According to the *Enquête* Commission's proposal, submission of a motion for self-dissolution to a vote would require the support of one-fourth of the members of the *Bundestag*. For passage, two-thirds of the deputies would have to vote in favor of dissolution.¹⁸⁴

Self-dissolution is rare among the world's western-style parliamentary governments.¹⁸⁵ This is probably because the flexible provisions for dissolution by the head of state make parliamentary self-dissolution unnecessary. Of the Federal Republic's West European neighbors, only Austria's *Nationalrat* has the power to dissolve itself.¹⁸⁶ This is accomplished by a law passed by a simple majority.¹⁸⁷ The power of self-dissolution exists in addition to the power of the government to dissolve and has become a tool of the government and its majority in the *Nationalrat* to bring about elections at a time favorable to them.¹⁸⁸ Self-dissolution occurs to end the legislative period in Austria as a matter of course; it is a rare parliament which survives to the end of the full legislative session.

In Israel, self-dissolution by the *Knesset* operates as a substitute for dissolution by the head of state, which is not allowed in the Israeli system.¹⁸⁹ As in Austria, dissolution takes place after a majority of the representatives present pass a law ending the legislative session.¹⁹⁰ Unlike the Austrian practice, however, dissolution is an unfavored procedure which has occurred relatively infrequently. Self-dissolution has been primarily used when the *Knesset* has been unable to form a ma-

182. *Die Verfassung ist kein schweizer Käse*, DER SPIEGEL, Sept. 19, 1966, at 43.

183. See *supra* text accompanying notes 68-70.

184. *Enquête Report*, *supra* note 49, at 32-48.

185. PARLIAMENTS, *supra* note 55, at 286.

186. BUNDES-VERFASSUNGSGESETZ, art. 29; Wolf & von Welck, *supra* note 61, at 139-40.

187. *Id.*

188. Widder, *Parlamentsauflösung und Regierungsbildung in Österreich*, 1972 ZPARL 86, 90.

189. K. VON BEYME, *supra* note 63, at 393.

190. Knesset (Basic Law), 12 L.S.I. 85, § 34 (Isr.). An English version of the text can be found in 8 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, (A. Blaustein & G. Flanz eds. 1978).

jority government.¹⁹¹ It is interesting to note that the Israelis also looked to the Weimar Republic as a negative model of parliamentary government and considered hedging their self-dissolution provision with a restriction that would have prohibited dissolution within one year after a general election. This restriction was not accepted however, because it was considered unrealistic to attempt to force the formation of a majority government where no real agreement between the political parties existed. Furthermore, restrictions on self-dissolution would have the undesirable effect of permitting a minority government to conduct state business in case no majority could be formed. In the words of one Israeli commentator, "The Knesset, it is suggested, was well advised to reject this proposition and trust the good sense of the electorate and their natural inclination to exercise their franchise in a way calculated to enable the Knesset to 'produce' a Government that could govern."¹⁹²

Within the Federal Republic itself, self-dissolution is a familiar institution. The parliaments in nine of the eleven West German *Länder* have the power of self-dissolution. In some cases this provision makes up for the lack of a head of state who can dissolve the legislative body.¹⁹³ For the *Landtage*, self-dissolution in practice functions as a last resort solution to resolve situations where the government is unable to operate effectively, or where it has lost its legitimacy.¹⁹⁴ In Bavaria, Hamburg, Hessen, Nordrhein-Westfalen, Rhineland-Pfalz and Schleswig-Holstein, the votes of a majority of all *Landtag* members will support self-dissolution.¹⁹⁵ Given the fact that the governments of these *Länder* and their parliamentary majorities function virtually as a unit, this scheme enables dissolution of the legislature in a manner similar to the procedure in Great Britain.¹⁹⁶

In the remaining three *Länder*, the obstacles to self-dissolution are greater. Berlin and the Saarland require that two-thirds of the members of parliament vote in favor of dissolution, and Niedersachsen requires support by two-thirds of the members present, providing that

191. E. LIKHOVSKY, *ISRAEL'S PARLIAMENT* 32 (1971).

192. *Id.* at 34.

193. Höfling, *Das Institut der Parlamentsauflösung in den deutschen Landesverfassungen*, 1982 DöV 889.

194. *Id.* at 890.

195. *Id.* The relevant texts from the constitutions of the *Länder* can be found in Wolf & von Welck, *supra* note 47, at 165-76.

196. Höfling, *supra* note 163, at 890. Note that in practice, the *Länder* have used the dissolution mechanism as a last resort in case of extreme difficulty in consolidating a majority in the legislature.

this number is at least a majority of all members.¹⁹⁷

In considering the adoption of a self-dissolution amendment to the Bonn Constitution, the Federal Republic will have to address two major issues. One question involves the quorum required for passage of a motion for dissolution. The other issue is the definition of the situations under which dissolution may occur.

The majority of critics who have commented on the subject seem to agree that the two-thirds majority requirement is necessary to prevent the majority in parliament from abusing the institution.¹⁹⁸ The members of the *Enquête* Commission preferred the two-thirds requirement to prevent the government from following the Austrian practice of dissolving the parliament in order to have an election at its convenience.¹⁹⁹ The *Enquête* Commission also feared that a permissive standard for self-dissolution would permit the government to submit issues to the voters, thus introducing elements of direct democracy into the German representative democracy scheme.²⁰⁰

A further means of protecting the minority is the requirement that the motion for dissolution be supported by one-fourth of the members of the *Bundestag*. The *Enquête* Commission felt that this restriction would force discussion of the dissolution issue, particularly in the case where a majority of the members of the *Bundestag* were against dissolution.²⁰¹ Some commentators have suggested the further restriction that the one-fourth of the *Bundestag* members supporting the motion for dissolution should consist of deputies from all the parties represented in the *Bundestag*, as an additional means of protecting the minority from abuse by the majority.²⁰²

Defining the factual circumstances under which self-dissolution procedures may be invoked present more difficulty than does the issue of quorum requirements. One commentator has remarked that there is no need to impose normative requirements for self-dissolution because the deputies will not willingly face loss of their seats without careful

197. *Id.* Self-dissolution of a *Land* parliament has taken place twice since the formation of the Federal Republic. The parliament in Niedersachsen was dissolved in 1969-1970 after a crisis in the government as was the parliament in West Berlin in 1981. In some of the *Länder*, dissolution by popular referendum is possible; the parliament in the Saarland was dissolved in this way in 1953. *Id.* at 889.

198. *See, e.g.*, Bull, *supra* note 69, at 204; Schenke, *supra* note 9, at 2528.

199. *Enquête Report*, *supra* note 49, at 41.

200. *Id.*

201. *Id.*

202. Gusseck, *supra* note 173, at 724.

consideration.²⁰³ In his view, the requirement that dissolution be supported by a vote of two-thirds of the deputies is ample protection from abuses by the majority.²⁰⁴

The *Enquête* Commission's self-dissolution proposal did not foresee a broadening of the institution of dissolution into the discretionary tool that exists in most other parliamentary systems. Self-dissolution was perceived as a method of resolving the situations which had arisen in 1966 and 1972, in which the tension between the government and opposition had become such that the majority could no longer effectively govern. Self-dissolution was not to be used to refer questions to the general public for approval, nor was it to be used as a means of "legitimizing" a chancellor elected by a constructive vote of no-confidence.²⁰⁵ Like the procedures in article 68, self-dissolution would be an emergency escape route from stalemated situations, placed in the hands of the *Bundestag* instead of in the hands of the chancellor or president to maintain the balance of power between the executive and legislative branches. The chancellor's competence to dissolve would remain limited to the constraints of articles 63 and 68. It was feared that broadening the chancellor's power to dissolve the *Bundestag* would make the executive branch too powerful.²⁰⁶

One critic has expressed concern that adopting the *Enquête* Commission's proposal without considering the changes brought about by the Constitutional Court's interpretation of article 68 will result in a shifting of the power relationships among the governmental organs contrary to the intent of the Bonn Constitution's drafters.²⁰⁷ In this critic's view, the court's decision leaves the chancellor with virtually unlimited discretion in requesting dissolution of the *Bundestag*, because it measures instability in the government according to the chancellor's subjective perception rather than by objective, external criteria. Adding a right to dissolve by a two-thirds majority in the *Bundestag* will do little to resolve the confusion unless some attempt is made to clarify the circumstances under which the chancellor can request dissolution. This commentator also feels that the constructive vote of no confidence may be affected by the changes in the dissolution provisions, and that this too will have to be considered.²⁰⁸

203. Bull, *supra* note 69, at 203-04.

204. *Id.*

205. *Enquête Report*, *supra* note 49, at 40-41.

206. *Id.*

207. Gusseck, *supra* note 173, at 724.

208. *Id.*

The above issues are all serious concerns which will have to be considered by the government before it adopts any constitutional amendment. For the foreign observer, the dissolution controversy reveals much about the contemporary West German political climate. The dispute can be seen as a product of Germany's experience with National Socialism. The unusually restrictive dissolution provisions were designed to avoid the perceived flaws in the Weimar Constitution, and loosening of the restrictions now is viewed skeptically as a return to the conditions which allowed the National Socialists to take over the government. In some sense, a loosening of the legal restrictions on the political process will be a measure of the growth of West German confidence in its postwar political institutions and in the political process itself. West Germany is changing. A generation brought up with democratic political institutions and with no direct personal experience with National Socialism is making itself felt on the political scene.²⁰⁹ This generation may wish to participate more directly in West Germany's "representative democracy," and fulfillment of this desire will necessitate some constitutional change.

This controversy has also illustrated the limits of legal control over the political process. Some decisions—such as whether a governing political coalition can continue to operate effectively—can be classified as "legal" or "illegal" only with great difficulty. Such decisions require the exercise of judgment regarding power relationships and social values which can be ill-defined in a legal context and which do not easily lend themselves to measurement with a judicial yardstick. The law cannot bring political stability to a situation where there is no basic consent to the legal and political order on the part of the citizens of a nation and their leaders. The law also cannot provide trustworthy political leaders. When a leader with sufficient strength wishes to upset the political system, this can be done either by circumventing the law or by using it to achieve the leader's own means. In short, the effective functioning of a democratic society demands a measure of mutual agreement and trust on the part of both citizens and their leaders. These intangible factors cannot be forced into existence by legal scholars and judges. In the years since World War II, the West Germans have been fortunate to have a stable political system and capable political leaders committed to the democratic process. Perhaps the current controversy reflects that they are just now beginning to be aware of this fact.

209. See *supra* note 19 and accompanying text.